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The Recording of Land Titles in South Carolina (Herein of Bona Fide Purchase of Land): A Title Examiner's Guide

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THE RECORDING OF LAND TITLES IN SOUTH CAROLINA (HEREIN OF BONA FIDE PURCHASE OF LAND): A TITLE EXAMINER'S GUIDE*

DAVID H. MEANS†

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INTRODUCTION

This article is a study of the priorities between competing claimants of land in South Carolina, both under the recording act and under common law and equitable principles in the absence of statute. The legislative scheme is inapplicable to certain transfers of interests in land,¹ and even where applicable to other interests it embodies in large part much of the previous non-statutory system.² Therefore, a working knowledge of the doctrines of priorities as developed in the absence of statute is essential to an understanding of the

1. See page 355 *et seq.*, *infra*.

2. It has been observed that the operation of the recording act in South Carolina results from the treatment of a legal interest created by an unrecorded instrument required by law to be recorded as a mere equity to which is applied the equitable doctrine of bona fide purchase of the legal title for valuable consideration without notice. In *Zorn v. Railroad Co.*, 5 S. C. 90, 101 (1874), Mr. Justice Willard thus discusses the theory and operation of the South Carolina recording act:

"The true rule on this subject is laid down by Chancellor Walworth in *Dickerson vs. Tillinghast*, 4 Paige N. Y., 215. Chancellor Walworth states the point so clearly, and exhibits the ground on which the construction of the Acts of registration rests, so far as it regards the requisites to constitute a valuable consideration under those Acts, that a better presentation cannot be made than that afforded by his language in the case just cited. It will be observed that what he says in regard to the construction of the registry laws of New York is directly applicable to our own Acts. He says: 'The English registry Acts made the unregistered deed or incumbrance at law wholly inoperative and void, as against a subsequent grantee or incumbrancer. But the Court of Chancery, in accordance with the manifest spirit and intention of the statute, at an early day adopted the principle of considering the prior deed or incumbrance as an equitable title or lien. It, therefore, applied to such cases, the equitable principles which had previously been adopted by that Court in relation to other contests between the holder of an equitable title or lien and a subsequent grantee or mortgagee of the legal title. In accordance with these principles, if the subsequent purchaser or mortgagee was a *bona fide* purchaser, that is, if he had actually parted with his property on the credit of the estate, so as to give him an equitable claim or specific lien thereon, without notice of the prior equity, and had also clothed that equitable lien with the legal title by taking a deed or mortgage, the Court would not divest him of that legal title or lien in favor of the prior equity. But if he had notice of the prior equity at any time before he had parted with his property on the credit of the estate, and before he had united the subsequent equity with the legal title, he was not considered as entitled to protection against the prior equity as a *bona fide* purchaser.

"The words *bona fide* purchaser, therefore, when introduced into our recording and registry Acts, were intended to be used in conformity with this established meaning thereof, and they must, in the present case, receive the same construction which they had previously received in the Court of Chancery in reference to that principle of equity. If a person has an equitable title to, or an equitable lien upon, real estate, a subsequent purchaser who obtains a conveyance of the legal estate, with notice of that equity, cannot, in conscience, retain such legal title, as he has no equity united with it. So if he merely takes the legal estate in payment

solutions to certain problems which have been reached in South Carolina.

The writer's aim has not been the production of a dissertation upon the history of the recording statutes in South Carolina, but rather an exposition of the principles of priority which prevail in present day South Carolina law. Despite this avowed purpose, however, the bulk of historical material included is all too likely to impress the practitioner as unconscionable pedantry and antiquarianism of the worst order. In extenuation it can only be said that it was felt necessary to include this material in order that a clear view may be had of the present South Carolina law.

The modern system of priorities of land titles is peculiarly a product of the legislature, and in few, if any, other areas of the law has the legislature been so ready to tinker with and alter the structure erected by prior legislative sessions. The first recording act in South Carolina dates from 1698,³ and since that time the legislative architects have worked at more or less frequent intervals either to alter drastically the design of the original plan, or else to remedy defects which experience has shown to exist in the system.

The many questions of priority of land titles which have confronted the South Carolina court in the main have been problems of the legislative intent as expressed in the then extant statutes. Since a subsequent change in the text of the statute may nullify wholly or in large part the value of a precedent, it is obvious that in evaluating the strength of any prior decision as a present day authority the then language of the statute must be compared carefully with its present formulation to insure that there has been no legislative alteration of the *ratio decidendi*. It is for this reason that such detailed tracing of the history of the present day recording system in South Carolina has been made. Wherever possible, this material has been relegated to the footnotes, where the reader may pursue it or not, as his particular problem may necessitate.

of or as security for a previous debt, without giving up any security, or divesting himself of any right, or placing himself in a worse situation than he would have been if he had received notice of the prior equitable title or lien previous to his purchase, this Court will not permit him to retain the legal title he has thus obtained to the injury of another.'"

3. 2 STAT. 137 (1698).

As to the importance of the subject matter herein treated, the reader, if not previously familiar with the fact, will be impressed by the great number of situations where gaps in the recording system theoretically make possible a loss to a purchaser despite the most diligent search of the record. Fortunately the judicial tables of title mortality show that statistically such instances occur with relative infrequency, and in the great majority of cases defects in a title (other than those caused by forgery, mental incapacity, and want of delivery) will be reflected of record. However, the title examiner lives by the record, and it is of importance that he be familiar with the defects in the system upon which he daily stakes his professional reputation.

I

PRIORITIES ASIDE FROM STATUTE

In the absence of statute priority between conflicting legal interests in land is determined by application of the maxim, first in time, first in right. Thus a prior legal interest prevails over a subsequent one irrespective of the want of notice to the subsequent purchaser of the legal title,⁴ unless some circumstance estops the holder of the prior legal interest from asserting such interest.⁵

Where the contest is between equitable interests the same rule as to the protection of the interest first created is in general applied,⁶ unless the holder of the earlier interest has by his conduct (either affirmatively or by failure to act) misled the subsequent purchaser for value as to the state of the title, in which event the later equity is preferred.⁷ A con-

4. See, among other South Carolina cases, *Donald v. McCord*, Rice Eq. 330, 340 (S. C. 1839) (personal property); (*Shultz v. Carter*, Speers Eq. 533, 542 (S. C. 1844); *Clark v. Smith*, 13 S. C. 585, 601 (1879); *McMorris v. Webb*, 17 S. C. 558, 563, 43 Am. Rep. 629 (1882); *Sondley v. Caldwell*, 28 S. C. 580, 583, 6 S. E. 818 (1888). See 4 AMERICAN LAW OF PROPERTY § 17.1 p. 523; 5 TIFFANY, REAL PROPERTY § 1257 p. 3 (3rd ed. 1939).

5. For a detailed discussion of the circumstances under which one not a party to a transaction involving land will be estopped by a failure to disclose his interest see Annot., 50 A. L. R. 668 (1927).

6. See, among other South Carolina cases, *Bush v. Bush*, 3 Strob. Eq. 131, 134 (S. C. 1849); *Brown v. Wood*, 6 Rich. Eq. 155, 167 (S. C. 1853) (Circuit decree, personal property); *Lynch v. Hancock*, 14 S. C. 66, 90 (1880). See 4 AMERICAN LAW OF PROPERTY § 17.1 p. 524; 5 TIFFANY, REAL PROPERTY § 1260 (3rd ed. 1939).

7. See *Maybin v. Kirby*, 4 Rich. Eq. 105, 114 (S. C. 1851) (rule stated as to successive assignments of a chose in action). See 4 AMERI-

siderable number of jurisdictions hold that even though the equities are otherwise equal, the bona fide purchaser for value of the later equity will prevail if he thereafter acquires the legal title, even after notice of the outstanding prior equity.⁸ However, in South Carolina,⁹ as in certain other jurisdictions,¹⁰ it has been held that the purchaser of the later equity cannot better his position by a subsequent acquisition of the legal title after notice of the prior equity.

Where the contest is between a legal interest and an equitable one, the legal interest, if prior in time, will prevail.¹¹ However, if the equitable interest was first created, the equitable doctrine of bona fide purchase will afford protection to the subsequent purchaser of the legal title only if the legal title was acquired for a valuable consideration and without notice of the prior equity.¹²

This in general is the common law system of priorities, upon which the American mosaic of title recordation has been inlaid.

II

HISTORY OF THE RECORDING ACT IN SOUTH CAROLINA

The first South Carolina legislation for the protection of subsequent grantees and mortgagees of land seems to be the

CAN LAW OF PROPERTY § 17.2; 5 TIFFANY, REAL PROPERTY § 1260 (3rd ed. 1939). It seems that even though the conduct of the holder of the prior equity has not been such as to constitute an estoppel, yet the court may prefer the later equity. *Bayley v. Greenleaf*, 7 Wheat. 46, 57, 5 L. Ed. 393 (U. S. 1822); *Hume v. Dixon*, 37 Ohio St. 66 (1881). 4 AMERICAN LAW OF PROPERTY § 17.2; 2 POMEROY, EQUITY JURISPRUDENCE §§ 413-415 (5th ed. 1941).

8. See cases cited in 4 AMERICAN LAW OF PROPERTY § 17.2 n. 6; 5 TIFFANY, REAL PROPERTY § 1261 n. 29.

9. South Carolina cases to this effect include *Bush v. Bush*, 3 Strob. Eq. 131, 51 Am. Dec. 675 (S. C. 1849); *Jones v. Godwin*, 10 Rich. Eq. 226 (S. C. 1858); *Lynch v. Hancock*, 14 S. C. 66, 90 (1880); *Lake v. Shumate*, 20 S. C. 23, 24 (1883) (decree of circuit judge).

10. See cases cited in 5 TIFFANY, REAL PROPERTY § 1261 n. 29 (3rd ed. 1939).

11. Among the many South Carolina cases to this effect, see *Blake v. Heyward*, Bailey Eq. 208, 221 (S. C. 1831); *Clark v. Smith*, 13 S. C. 585, 601 (1879); *Hardin v. Melton*, 28 S. C. 38, 45, 4 S. E. 805, petition for rehearing dismissed 9 S. E. 423 (1888); *Sweatman v. Edmunds*, 28 S. C. 58, 62, 5 S. E. 165 (1888) (in which case the applicability of the doctrine is doubtful, however). See 4 AMERICAN LAW OF PROPERTY § 17.1; 5 TIFFANY, REAL PROPERTY § 1258 (3rd ed. 1939).

12. See *Kirtan v. Howard*, 137 S. C. 11, 36, 134 S. E. 859 (1926), and the many cases therein cited.

Act of 1698,¹³ entitled "An act to prevent deceits by double mortgages and conveyances of lands, negroes and chattels, etc." The preamble recites the hardships which have resulted from the opportunity given to "knavish and necessitous persons to make two or more sales, conveyances and mortgages of the same plantation, negroes and other goods and chattels. . . ." For remedy it is provided (as to land) "That that sale, conveyance, or mortgage of lands and tenements, except original grants, which shall be first registered in the Register's Office in Charleston, shall be . . . held to be the first sale, conveyance and mortgage, and to be good . . . in all courts . . . within South Carolina, any form or other sale, conveyance or mortgage of the same land not before registered notwithstanding. . . ." All deeds and mortgages executed prior to passage of the act were to be recorded before 1 June, 1699, or lose their priority to subsequently recorded instruments. The act further provided that should the Register furnish a false certificate that no instruments affecting a title had been recorded with him, he should be liable to the person making such inquiry for the damages sustained as a consequence of such false certification.

An act in 1731¹⁴ recites the beneficial effect of the requirement of registration of conveyances, and provides "That the recorder or register of deeds or conveyances of land and mortgages shall be and continue separated and distinct from any other office or officer whatsoever. . . ." Other sections¹⁵ provided for the registration of all lands held either by original patent or grant, which the Act of 1698 had not required, as well as by mesne conveyance, within eighteen months after passage of the act, on penalty of having title to land not so registered deemed vacant land subject to claim by any person. Leasehold estates are expressly excluded from the provisions of the act.¹⁶ Saving clauses in favor of minors, *feme coverts* and persons residing without the Province, and provisions for proof of lost or destroyed deeds are included.

13. 2 STAT. 137 (1698).

14. 3 STAT. 296 (1731).

15. 3 STAT. 290-293 (1731).

16. 3 STAT. 291 (1731). Subsequent acts provided for the recording of marriage contracts and settlements [4 STAT. 656 (1785), 5 STAT. 203 (1792), 6 STAT. 213 (1823)] and of leases for a term longer than twelve months [6 STAT. 67 (1817)].

The forty-fifth section¹⁷ of the Act of 1785, entitled "An act establishing county courts, and for regulating the proceedings therein," apparently constitutes the next major development in the recording legislation of South Carolina. It was thereby provided "That no conveyance of lands . . . shall pass . . . from one person . . . to another, any estate of inheritance in fee simple, or any estate for life . . . unless the same be made in writing . . . recorded in the clerk's office of the county where the land . . . shall lie. . . ." Recordation must be within six months after execution and delivery in the case of grantors residing within the state, one year in the case of grantors residing in other states of the United States, and within two years in the case of grantors residing without the United States, "and if any . . . conveyances shall not be recorded within the respective times before mentioned, such . . . conveyances shall be legal and valid only as to the parties themselves and their heirs, but shall be void and incapable of barring the rights of parties claiming as creditors, or under subsequent purchases, recorded in the manner hereinbefore prescribed. . . ."

Four years after the Act of 1785 it was found desirable to extend the time of compliance with the recording requirements thereof until one year after the enactment of a statute in 1789,¹⁸ because of the recited fact that the title of the Act of 1785 had not sufficiently given notice of the recordation requirements thereof.

In 1843 the law as to the recordation of mortgages was altered by a provision "That no mortgage . . . of real estate, shall be valid so as to affect the rights of subsequent creditors or purchasers for valuable consideration, without notice, unless the same shall be recorded . . . within sixty days from the execution thereof. . . ."¹⁹

With minor exceptions the essential text of the recording statutes remained unchanged until 1872,²⁰ when "an act to more effectually provide for the recording of all conveyances

17. 7 STAT. 232 (1785).

18. 5 STAT. 127 (1789).

19. 11 STAT. 277 (1843).

20. See REV. STAT. Ch. LXXXII, approved by Act of the General Assembly, 10 Feb. 1872.

of real estate"²¹ was enacted. It was therein provided "That every conveyance of real estate . . . shall, within thirty-three days, be recorded . . . and every such conveyance, not so recorded, shall be void, as against any subsequent purchases, in good faith, and for a valuable consideration, of the same real estate . . . *Provided*, such subsequent purchaser shall have first recorded his said conveyance."

In 1876 the basic text of the recording law again was altered by "an act to provide an uniform registry law for all deeds and other instruments in writing required to be recorded."²² This act provided "That all deeds or conveyances of land . . . shall be valid, so as to affect from the time of such delivery or execution the rights of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of such delivery or execution . . . *Provided, nevertheless*, That . . . if recorded subsequent to the expiration of said period of forty days, shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice only from the date of such record."

With but one exception²³ all subsequent recording legislation stems from the Act of 1876, and despite the many amendments since made, the essential language of that act is embodied in the present law of the state.²⁴ These amendments, and the effects thereof, will be discussed in the treatment of the present law.

21. 15 STAT. 5 (1872).

22. 16 STAT. 92 (1876).

23. In 1916 the Torrens System of land registration was enacted, to become effective July 1, 1916 (29 STAT. 943). In his comprehensive survey of the status of the Torrens System in the United States, Professor McCall makes the following comment upon the system in South Carolina:

"A prominent attorney of Columbia, S. C., wrote in a letter dated March 8, 1932: 'The Torrens statute was passed in this state a good many years ago, but so far as I know the system has never been used at all in this state.' The Lawyer and Banker's [16 LAWYER AND BANKER 37 (1922)] table shows that up to August 25, 1922, only 71 titles had been registered." McCall, *The Torrens System—After Thirty-five Years*, 10 N. C. L. REV. 329, 336 (1932).

While no formal repeal of the act has been found, it would seem no longer to be law in view of its omission from the CODE OF LAWS of 1922 and all subsequent codes. S. C. CONST. 1895, art. 6 § 5. *Nexsen v. Ward*, 96 S. C. 313, 80 S. E. 599 (1914); *Paris Mt. Water Co. v. Greenville*, 105 S. C. 180, 89 S. E. 669 (1916).

24. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-101.

III

INSTRUMENTS AND TRANSFERS AFFECTED

A. *In general*

The statute²⁵ prescribes that the following instruments affecting title to land shall be recorded: "[a]ll deeds of conveyance of lands, tenements or hereditaments, either in fee simple or for life . . . deeds of trust or instruments in writing conveying . . . real . . . estate, creating a trust in regard to such property or charging or encumbering it, . . . mortgages . . . marriage settlements . . . leases or contracts in writing made between landlord and tenant for a longer period than twelve months . . . statutory liens on buildings and lands for materials or labor furnished on them . . . certificates of renunciation of dower . . . contracts for the purchase and sale of real property . . . assignments,²⁶ satisfactions, releases and contracts in the nature of subordinations, waivers and extensions of landlords' liens, sharecroppers' liens or other liens on real or personal property or both, created by law or by agreement of the parties and generally all instruments required by law to be recorded. . . ."

Despite the broad language of the statute serious questions are raised as to its applicability to certain transfers of interests in land. The applicability or non-applicability of the re-

25. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-101.

26. By virtue of legislation enacted in 1924 (33 STAT. 928) a release or satisfaction of the lien of a mortgage of real property made by the record owner of such mortgage is valid for the protection of a subsequent purchaser for value or a subsequent creditor obtaining a lien on the property, notwithstanding the existence of an unrecorded assignment, unless such creditor or purchaser, prior to the acquisition of his interest, had notice of the unrecorded assignment. As subsequently amended this statute now constitutes CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-103. In 1934 (38 STAT. 1521) the general recording act also was amended to provide for the recordation of mortgage assignments and contracts in the nature of subordinations, waivers and extensions. See text of the recording act, set out above.

Prior to the act of 1924, *supra*, persons protected thereby dealt with the record holder of a mortgage at their peril. *Williams v. Paysinger*, 15 S. C. 171 (1881); *Singleton v. Singleton*, 60 S. C. 216, 38 S. E. 462 (1901); *Union National Bank of Columbia v. Cook*, 110 S. C. 99, 96 S. E. 484 (1918). It is improbable that the act will be construed to afford protection to subsequent assignees of the mortgage. Also, it seems obvious that the recordation of the assignment of a mortgage is not constructive notice to the mortgagor. The mortgagor in such a case is not a subsequent but a prior party, and his rights, therefore, would be affected only by the law of assignments.

cording act to legal interests acquired by adverse possession or presumption of a grant, by prescription, by implication, by bankruptcy, and to equitable interests acquired by way of estoppel *in pais*,²⁷ parol gift, or sale, constructive or resulting trusts, the right of reformation of an instrument, and the right of reinstatement of a mortgage present problems which necessitate careful analysis.

B. Adverse possession

Suppose that in 1930 A wrongfully went into possession of a tract of land in South Carolina owned by B, and continuously occupied it under circumstances which gave him title thereto by adverse possession after the expiration of ten years²⁸ in 1940. Suppose further that A then moved off the land, which remains vacant until 1953, when it is sold and conveyed by B to C, who pays value in reliance upon B's perfect record title, and with no knowledge of any infirmity therein. A then brings action against C to recover possession of the land. Is the recording act a defense to C?

The general rule, apparently law in South Carolina,²⁹ is that a title acquired by adverse possession is one to which the recording act has no application.³⁰ Thus in a leading case,³¹ the facts of which closely parallel those in our hypothetical situation, it was held that the title acquired by adverse possession was superior to the claim of the subsequent bona fide purchaser of the record title, the court stating: "[t]itles matured under the statute of limitations, are not within the recording acts. However expedient it might be to require some

27. See note 79, *infra*, for a discussion of the nature of an interest in land created by an estoppel *in pais*.

28. In South Carolina the period prescribed for the acquisition of title to land by adverse possession is ten years. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-124, 10-126, 10-127, 10-2421.

29. *Cabiness v. Mahon*, 2 McC. 273 (S. C. 1822), discussed in note 36, *infra*; *Gordon v. Parsons*, 1 Bay 37 (S. C. 1786).

30. *Falcon v. Simshauser*, 130 Ill. 649, 22 N. E. 835 (1889); *Lowi v. David*, 134 Miss. 296, 98 So. 684 (1924); *Ridgeway v. Holliday*, 59 Mo. 444 (1875); *Schall v. Williams Valley R. Co.*, 35 Pa. 191 (1860); *MacGregor v. Thompson*, 7 Tex. Civ. App. 32, 26 S. W. 649 (1894); *East Texas Land etc. Co. v. Shelby*, 17 Tex. Civ. App. 685, 41 S. W. 542 (1897); *Mugaas v. Smith*, 33 Wash. 2d 429, 206 P. 2d 332, 9 A. L. R. 2d 846 (1949). See OSBORNE, MORTGAGES 545; 4 AMERICAN LAW OF PROPERTY § 17.8 p. 553; Annot., 9 A. L. R. 2d 850 (1950); Ferrier, *The Recording Acts & Titles by Adverse Possession & Prescription*, 14 CALIF. LAW REVIEW 287 (1926).

31. *Schall v. Williams Valley R. Co.*, 35 Pa. 191 (1860).

public record of such titles to be kept, and however inconvenient it may be to purchasers to ascertain what titles of that sort are outstanding, still we have not as yet any legislation on the subject, and it is not competent for judicial decision to force upon them consequences drawn from the recording acts. These acts relate exclusively to written titles. . . . So long as we retain this statute [of limitations], and hold it in so high esteem, conveyancers and purchasers should not content themselves with merely searching registries, which were an invention consequent upon written titles, but they should make themselves familiar with the history of the possession. . . . And if they would be relieved of this necessity, they must get the legislature to contrive a mode of putting this kind of title on the public records. 'Til that is done, the courts will be obliged to give effect to such titles without regard to records."

Since the South Carolina legislature has imposed no requirements nor provided any method for the recordation of titles acquired by adverse possession, such titles would appear to be entirely without the operation of the recording statutes.³²

32. It is true that the adverse possessor who has acquired title by running of the statutory period may assert affirmatively the title acquired by him. *Harrelson v. Sarvis*, 39 S. C. 14, 17 S. E. 368 (1893); *Busby v. Ry.*, 45 S. C. 312, 23 S. E. 50 (1895); *Duren v. Kee*, 50 S. C. 444, 27 S. E. 875 (1897). It further seems clear that such adverse possessor may maintain an action to quiet title against the holder of the paper title. *Brevard v. Fortune*, 221 S. C. 117, 69 S. E. 2d 355 (1952). See Annot., 78 A. L. R. 24, 110 (1932). However, the institution of such an action would appear to rest entirely in the option of the adverse possessor. In *Ridgeway v. Holliday*, 59 Mo. 444, 455 (1875), the court made the following observation: "Whether it is incumbent on the owner, by adverse possession, to perpetuate the evidence of his title by proceeding to remove the cloud thereon, occasioned by the existence of the record title in another, so as to affect subsequent purchasers with notice, it is not necessary to inquire." (This because the court found that the subsequent purchaser could not qualify as one without notice.) In the absence of statutory duty to bring such an action imposed upon the adverse possessor it would seem that his failure to do so could in no way inure to the benefit of the record title holder or a bona fide purchaser from him. For suggested legislative reform of this undesirable situation see Ferrier, *The Recording Acts & Titles by Adverse Possession & Prescription*, 14 CALIF. LAW REV. 287, 296 (1926).

A Pennsylvania statute provides a method whereby a person who has acquired title by adverse possession may file a record of his claim. *PURDON'S PA. STATUTES*, 1936, tit. 68, c. 2, § 86 of the statute provides: "Unless a statement of claim be made and recorded as herein provided, no title to lands by twenty-one years' adverse possession, as aforesaid, shall avail against any purchaser, mortgagee, or judgment creditor for value, without notice, his heirs and assigns, except the claimant be in possession of such lands at the time of such purchase."

C. *Adverse possession by grantee under an unrecorded deed*

Suppose a grantee of land under a valid but unrecorded deed has been in possession for more than the statutory period necessary to establish title by adverse possession. Thereafter his grantor sells and conveys the land to a bona fide purchaser for value without notice of the prior unrecorded deed. Can the first grantee establish title to the land by adverse possession and thus avoid the consequences of the nonrecording of his deed? In an Alabama case³³ the question was answered in the affirmative, the court holding that the grantee under the unrecorded deed having acquired title by adverse possession, his failure to record his deed therefore was immaterial.

The practical consequence of such a holding is readily apparent. If the grantee under an unrecorded deed has held possession for the statutory period necessary to acquire title by adverse possession (ten years in South Carolina³⁴), his failure to record thereafter becomes immaterial, and reliance upon the record by a subsequent purchaser is futile. Thus the uncertainty existing as to the fortunately rare title founded solely upon adverse possession is multiplied ten thousand times, a result clearly inimical to the proper functioning of the recording system.

The hiatus in the reasoning of the Alabama court would seem to be the assumption that an owner of land can acquire title thereto by adverse possession in derogation of his subsisting title; *i. e.*, that a person can hold adversely to himself. The proposition at best is dubious,³⁵ and when considered as an original one it would seem that before espousing it a court should weigh carefully its destructive effect upon the integrity of the recording system.

Unfortunately two early cases³⁶ which antedate the better known Alabama case held the doctrine to be law in South

33. *Winters v. Powell*, 180 Ala. 425, 61 So. 96 (1912); *s. c.* on a subsequent appeal *sub nom.* *Nolen v. Powell*, 64 So. 566 (1913).

34. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-124.

35. 4 TIFFANY, REAL PROPERTY § 1177 at p. 508 (3rd ed. 1939); 26 HARV. L. REV. 762 (1913). But see Ferrier, *The Recording Acts & Titles by Adverse Possession & Prescription*, 14 CALIF. L. REV. 287, 289 (1926). See also OSBORNE, MORTGAGES 545 n. 64.

36. *Gordon v. Parsons*, 1 Bay 37 (S. C. 1786); *Cabiness v. Mahon*, 2 McC. 273 (S. C. 1822). In the *Cabiness* case, the action was trespass to try title. The plaintiff was a purchaser for value of the record title without notice of a prior unrecorded deed to the defendant. The defendant had been in possession under his deed for more than the statutory period, but the court found that the circumstances of the possession were

Carolina. It is to be hoped that if the question is again presented the South Carolina court will not hesitate to repudiate these earlier decisions.

D. *Prescriptive easements*

Where a prescriptive easement burdening land has been obtained, does a subsequent purchaser of the servient tenement purchasing in reliance upon the record title and without notice of the easement³⁷ take free thereof? In view of the answer which the courts have uniformly reached in the adverse possession situation,³⁸ it would seem necessarily to follow that the subsequent purchaser likewise would take subject to an easement obtained by prescription. However, on this point the limited body of authority is not in accord, some courts³⁹ holding that the subsequent purchaser without notice

not sufficient to charge the plaintiff with notice of the defendant's claim. The trial judge charged the jury that the defendant's deed not having been recorded, the plaintiff must prevail under his subsequent deed. On appeal from judgment on a verdict for the plaintiff, a new trial was granted, the appellate court stating (at p. 275):

"[I]t appears that the defendant's title by possession was regarded as contaminated by his paper title. That a party may succeed on his possession when he has failed to prove a paper title, is not now to be questioned. Where adverse possession . . . is proved, a written muniment is of no other use than to show the extent of his possession. The defendant had twenty years possession of this land. During the whole of that period he held adversely to Wright [the common grantor of plaintiff and defendant]. The deed of Wright was unimportant to the defendant after the first five years [the then period of the statute of limitations], except to show the extent of his possession; and this might be done by evidence much less formal than a deed duly executed and recorded in the register's office."

See also *Beck v. Northwestern R. Co. of S. C.*, 105 S. C. 319, 89 S. E. 1018 (1916), wherein the plaintiff claimed to have purchased land without actual or record notice (because the deed was not probated) of a grant of a right of way easement to the defendant's predecessor by plaintiff's predecessor in title. The lower court's judgment for the defendant was affirmed by the Supreme Court on the principal ground that the record in the case did not disclose the plaintiff to be a purchaser without notice. However, the court further said (105 S. C. at p. 327): "Under the grant of [plaintiff's predecessor] . . . though improperly recorded, the defendant and its predecessors, for over 21 years before plaintiff purchased, had been claiming the easement in question under a paper title duly signed and witnessed. *This alone was sufficient to ripen the claim of easement of defendant into such title as to defeat the claim of plaintiff as purchaser to compensation for the lands taken actually and claimed by it under the grant.*" (Emphasis added.)

37. As to what circumstances will be sufficient to charge a purchaser of the servient estate with notice of the existence of the easement, see p. 389, *post*.

38. See page 356, *supra*.

39. *McKeon v. Brammer*, 238 Iowa 1113, 29 N. W. 2d 518 (1947); *Riggs v. Ketner*, 299 Ky. 754, 187 S. W. 2d 287 (1945); *Shaughnessey v. Leary*, 162 Mass. 108, 38 N. E. 197 (1894); *Ferguson v. Standley*,

takes subject to the prescriptive easement, while another⁴⁰ has held, and others⁴¹ indicated, that the bona fide purchaser of the record title takes free of easements of which he had no notice.⁴²

A sophistical rationalization has been suggested to explain the different treatment afforded titles by adverse possession and easements by prescription under the recording acts. Title by adverse possession is obtained by virtue of the statute of limitations barring the remedy of the paper title holder, while an easement by prescription rests upon the fiction of a presumed lost grant.⁴³ Spelling out the consequences of the theory of prescription, "[t]he fiction is extended to holding that the presumed grant should have been recorded before it was lost."⁴⁴ Mention is made of this possible rationalization for subjecting the prescriptive easement to the requirements of the recording act, since, if it should be applied in South Carolina, a further logical consequence would necessitate a similar treatment of the title to land acquired by presumption of a grant.

E. Presumption of a grant

It is familiar law to the South Carolina practitioner that in this state the fiction of the presumed lost grant is not only

89 Mont. 489, 300 Pac. 245 (1931); *Heard v. Bowen*, 184 S. W. 234 (Tex. Civ. App. 1916). 3 POWELL, REAL PROPERTY § 434 p. 502.

40. *Schwartz v. Atlantic Building Co.*, 41 App. D. C. 108 (1913).

41. *Schmidt v. Brown*, 226 Ill. 590, 80 N. E. 1071, 11 L. R. A. (N. S.) 457, 17 Am. St. Rep. 261 (1907); *St. Cecilia Society v. Universal, etc., Co.*, 213 Mich. 569, 182 N. W. 161 (1921); *Van De Vanter v. Flaherty*, 37 Wash. 218, 79 Pac. 794 (1905). See OSBORNE, MORTGAGES 545; Ferrier, *The Recording Acts & Titles by Adverse Possession & Prescription*, 14 CALIF. L. REV. 287, 291 (1926). No South Carolina case has been found.

42. A similar conflict exists when an easement created other than by deed has been acquired by the public, either by so-called prescription or by common law dedication. There are cases stating that the subsequent purchaser takes free of such interests of which the purchaser had no notice. See *Poskey v. Bradley*, 209 Ark. 93, 189 S. W. 2d 806, 810 (1945); 26 C. J. S. 536. However, in South Carolina it may be that the subsequent purchaser takes subject thereto, despite his want of notice. See *Frost v. Columbia Clay Co.*, 130 S. C. 72, 124 S. E. 767 (1924).

43. *Lamb v. Crosland*, 4 Rich. 536 (S. C. 1851). 4 TIFFANY, REAL PROPERTY § 1191 (3rd ed. 1939).

44. OSBORNE, MORTGAGES 544. Professor Osborne further comments (at page 545): "This explanation has merit only to the extent that the policy of the recording acts justifies invalidation of secret legal interests even though they are unrecordable and could not readily be made recordable — a step that seems entirely too drastic." See also Ferrier, *The Recording Acts & Titles by Adverse Possession & Prescription*, 14 CALIF. L. REV. 287, 292 (1926); BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY 126 (2d ed. 1954).

the basis for the acquisition of prescriptive easements but also may be relied upon to establish title to land under circumstances where a claim under the statute of limitations has not yet ripened into a title by adverse possession.⁴⁵

Since the acquisition of title to land by presumption of a grant is analogous to the prescription of an easement in that both are founded upon the fiction of a presumed lost grant, on the basis of the above mentioned⁴⁶ rationalization of decisions from other states involving easements by prescription, it may be argued that while a title by adverse possession is not within the scope of the recording act, a title by presumption of a grant is within its terms. As above pointed out,⁴⁷ however, the ground of such a distinction seems specious, and it is unlikely that the South Carolina court will give to the title by presumption of a grant a treatment different from that afforded titles by adverse possession.

F. *Easements by implication*

While easements created by express grant very generally are considered to be within the terms of the recording acts,⁴⁸

45. *Trustees of Wadsworthville Poor School v. Jennings*, 40 S. C. 168, 18 S. E. 257 (1893). See *Smith v. Asbell*, 2 Strob. 141 (S. C. 1847); *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727 (1923). For example, A goes into adverse possession of O's land and holds it for seven years. A then conveys to B, who holds for seven more years before conveying to C. The statute of limitations in South Carolina is ten years. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 10-124, 10-126, 10-127, 10-2421. However, in South Carolina adverse possessions may not be tacked by grantor and grantee to make out the statutory period. See *Garrett v. Weinberg*, 48 S. C. 28, 26 S. E. 3 (1896), and the many South Carolina cases collected in 2 C. J. 86, note 46; 2 C. J. S. 688, notes 75, 76. Therefore, even though O has been disseised for a total of fourteen years, he can still maintain ejectment against C. However, where a claimant of land is proceeding on the theory of the presumption of a grant (twenty years), tacking between grantor and grantee is permitted. *Thomson v. Peake*, 7 Rich. 353 (S. C. 1854); *Sutton v. Clarke*, 59 S. C. 440, 38 S. E. 150 (1901). See *Haithcock v. Haithcock*, 123 S. C. 61, 115 S. E. 727 (1923). Therefore, if C holds adversely for seven more years (making a total of twenty-one years during which O has been disseised) C will have acquired title by presumption of a grant, even though he has no title by adverse possession. For a fuller discussion of this and other important distinctions between adverse possession and presumption of a grant in South Carolina, see Means, *Words of Inheritance in Deeds of Land in South Carolina: A Title Examiner's Guide*, 5 S. C. L. Q. 313, 354 (1953).

46. See p. 360, *supra*.

47. See p. 360, *supra*.

48. 4 AMERICAN LAW OF PROPERTY § 17.8; 3 TIFFANY, REAL PROPERTY § 828 (3rd ed. 1939). The language "tenements or hereditaments" in the South Carolina statute [CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-101] is inclusive of easements appurtenant, profits à prendre (both appurtenant and in gross) and, it seems, of easements in gross. See 42 AM. JUR., *Property* §§ 16, 17 (1942). *Henry v. Southern Ry.*, 93 S. C.

the applicability of such acts to implied easements⁴⁹ created by duly recorded instruments is a question to which American case law affords no uniform answer. Thus some cases⁵⁰ have held that an innocent purchaser of the servient estate takes free of implied easements of which he had no notice, while others⁵¹ have declared the hapless purchaser subject thereto. While a logical interpretation of the recording act would seem to favor the dominant tenant,^{52, 53} yet the broad policy of the

125, 75 S. E. 1018 (1912) would seem not to be authority to the contrary.

49. The term is inclusive of ways of necessity.

50. *Mesmer v. Uharriet*, 174 Cal. 110, 162 Pac. 104 (1916); *Hawley v. McCabe*, 117 Conn. 558, 169 Atl. 192 (1933); *Backhausen v. Mayer*, 204 Wis. 286, 234 N. W. 904, 74 A. L. R. 1245 (1931); *Schmidt v. Hilty-Forster Lumber Co.*, 239 Wis. 514, 1 N. W. 2d 154 (1941).

51. Such seems to be the holding of the following cases: *Logan v. Stogsdale*, 123 Ind. 372, 24 N. E. 135 (1890); *Thomas v. McCoy*, 48 Ind. 403, 96 N. E. 14 (1911); *Zimmerman v. Cockey*, 118 Md. 491, 84 Atl. 743 (1912); *Wissler v. Hershey*, 23 Pa. 333 (1854); *Wiesel v. Smira*, 49 R. I. 246, 142 Atl. 148, 58 A. L. R. 818 (1928).

52. "It is submitted that no one should be prejudiced by the operation of the recording act when he has not omitted any step required thereby. In fact, those acts in no proper sense *create* rights (except as a subsequent purchaser for value may take free of interests created by instruments not recorded as required); they merely require certain steps by an owner in order to *preserve* his rights [italics in original]. . . . What more could X [the grantee by a recorded deed of an implied easement of necessity] have done . . . to save his rights, so far as the recording act was concerned? It is true that he might have insisted on his way being provided for expressly in his deed, but that could hardly have been required by the recording act, certainly no more so than a deed can be said to be required by one who acquires ownership by prescription or adverse possession. It may be said in justification of the result reached in the principal case that it is desirable to cut off easements by implication as against innocent purchasers of the servient land, and that to hold otherwise would place an almost impossible burden upon the searcher of titles, whether he be a prospective purchaser, attorney, or abstractor. But it is submitted that such result cannot properly be reached by applying the recording act. . . . The enactment of a statute expressly dealing with implied easements would seem to present a better method of reaching the desired end." 29 MICH. L. REV. 1083, 1084 (1931) (casenote criticizing *Backhausen v. Mayer*, note 50, *supra*).

53. The text writers and law review commentators appear to favor the dominant tenant. See WALSH, MORTGAGES 142; OSBORNE, MORTGAGES 546; Ferrier, *The Recording Acts & Titles by Adverse Possession & Prescription*, 14 CALIF. L. REV. 287, 295 (1926); 29 MICH. L. REV. 1083 (1931) (quoted in note 52, *supra*). But see 3 TIFFANY, REAL PROPERTY § 793 at p. 294, § 828 at p. 399 (3rd ed. 1939); 3 POWELL, REAL PROPERTY § 424 at p. 502 (indicating that while a conveyance of the servient estate to a bona fide purchaser without notice extinguishes an implied easement, such conveyance may not extinguish an easement by necessity). The encyclopedias appear to favor the subsequent purchaser. See 17 AM. JUR., *Easements* § 128; 19 C. J., *Easements* § 147 p. 940. However, their treatment would seem inadequate and without appreciation of the scope of the problem. See *Wiesel v. Smira*, 49 R. I. 246, 142 Atl. 148, 58 A. L. R. 818 (1928) for a critical appraisal of the encyclopedic authorities. This case occasioned additional text statement in 28 C. J. S., *Easements* § 50 p. 715.

act weighs in favor of the subsequent purchaser.⁵⁴ No South Carolina case considering the question has been found.

G. *Bankruptcy proceedings*

A section⁵⁵ of the Chandler Act of 1938 provides in substance that a state may authorize the recording of a certified copy of the bankruptcy petition with the schedules omitted, the decree of adjudication, or the order approving the trustee's bond, in the office where conveyances of real property are recorded. Unless such recordation has been made in the county where the land is situated, a bona fide purchaser or lienor without actual notice of the bankruptcy proceedings is protected, except where the land lies in the county in which is kept the original records of the bankruptcy proceeding. In 1939, South Carolina enacted a statute⁵⁶ in compliance with the above provisions of the Chandler Act. This would seem to eliminate the previous uncertainty⁵⁷ as to the necessary extent of bankruptcy search by the examiner of land titles in South Carolina.

H. *Mechanics liens*⁵⁸

In South Carolina a mechanic's lien is by the terms of the recording act⁵⁹ required to be recorded so as to affect subsequent parties without notice thereof. The fact that under the mechanic's lien statutes a claimant has a grace period of ninety days within which to file statement of his lien⁶⁰ does not afford him priority over a subsequent mortgagee or purchaser for value without notice.⁶¹

54. "The maintenance of the effectiveness of our registry system requires that one who relies in good faith upon a record title apparently complete shall be protected against any claimed interest not of record, of which he has no notice. . . . In the absence of actual notice of the existence of an easement or of physical facts which would put him upon inquiry, one purchasing property may rely upon the land records to disclose the existence of such a charge upon the property." Hawley v. McCabe, 117 Conn. 558, 169 Atl. 192 (1933).

55. 52 STAT. 840 c. 575 § 21 (g); 11 U. S. C. A. § 44.

56. 41 STAT. 185 (1939); CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-66.

57. See PATTON, LAND TITLES § 355 and 1952 Pocket Part Supplement thereto at p. 223.

58. CODE OF LAWS OF SOUTH CAROLINA, 1952 tit. 45 c. 5.

59. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-101.

60. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 45-259.

61. Williamson v. Hotel Melrose, 110 S. C. 1, 96 S. E. 407 (1918) (mortgage lien afforded priority). As to the perfection of the lien see Lowndes Hill Realty Co. v. Greenville Concrete Co., 229 S. C. 619, 93 S. E. 2d 855 (1956).

I. *Lien of judgment upon property of railroad or street railway corporation*

A statute⁶² provides that a judgment obtained against a railroad or street railway corporation by any person for personal injury or injury to property, or by a municipality for injury to its streets or highways, shall relate back to the date when the cause of action arose and shall be a lien upon the property of such corporation as of that date, and shall take precedence and priority over any mortgage, deed of trust or other security given to secure the payment of bonds made by such railroad or street railway corporation. The statute further provides that its provisions are applicable only if action is commenced within two years from the time that the injury was sustained.

A judgment obtained in compliance with the terms of the statute takes precedence over a railroad mortgage issued subsequent to the statute's enactment but prior to accrual of the plaintiff's cause of action.⁶³ If a sale instead of a mortgage of railroad property is involved, since the lien of the judgment relates back to the date the cause of action accrued, a transferee acquiring title subsequent to the accrual of the cause of action therefore takes subject to such lien. In such a case the purchaser takes the property with an inchoate statutory lien upon it, and such a purchaser cannot claim a want of notice.⁶⁴

J. *Dower*

Suppose that A conveys land to B by a proper deed which is not recorded. Thereafter A sells and conveys the same land to C, who purchases without notice of the prior deed to B. Clearly the recording act protects C as against B, but does it also protect him as against the dower interest of B's wife?

62. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 58-744 [36 STAT. 1363 (1930), 22 STAT. 415 (1897), 17 STAT. 791, 835 (1882)].

63. Southern Ry. Co. v. Bouknight, 70 Fed. 442 (4th Cir. 1895). Among other cases see Link v. Receivers of Seaboard Airline Ry. Co., 73 F. 2d 149 (4th Cir. 1934).

64. Henry Mercantile Co. v. Graham, Sheriff, 108 S. C. 125, 93 S. E. 331 (1917). Cf. Clark v. Smith, 13 S. C. 585 (1879), which held that a purchaser of land burdened with a statutory lien for which there was no provision for recording (the no longer existent purchase money lien on land sold in partition) took subject to the lien despite his lack of actual notice.

In South Carolina it has been held⁶⁵ that the failure of the husband to record his deed in no way prejudices the dower interest of the wife. Not only is this result unfortunate as a matter of policy because destructive of the integrity of the recording system, but the court's rationale in support of the result is questionable. As a general rule dower is a derivative estate, subject to defects or defeasances existent in the husband's title at the time the right of dower attaches.⁶⁶ It would appear, therefore, that a defeasance of the grantee's title resulting from a failure to record likewise should be held to defeat the dower interest of the grantee's spouse. A decision of the Indiana court⁶⁷ to this effect seems preferable to the result reached by the South Carolina court as a matter of logic as well as of policy.

K. Other interests created without a written instrument

It is familiar law that in a number of situations other than those hereinabove discussed⁶⁸ interests in land can be created without the employment of a written instrument. Thus such

65. *Pickett v. Lyles*, 5 S. C. 275 (1874); *Sondley v. Caldwell*, 28 S. C. 580, 6 S. E. 818 (1888). Dower being a legal interest, the defense of bona fide purchase of the legal title without notice is inapplicable. *McMorris v. Webb*, 17 S. C. 558, 43 Am. Rep. 629 (1882); *Sondley v. Caldwell*, *supra*.

66. See monograph, *Dower & Curtesy as Derivative Estates*, which is an appendix to *RESTATEMENT, PROPERTY* Vol. I; Annot., 25 A. L. R. 2d 333 (1952).

67. *Alexander v. Herbert*, 60 Ind. 184 (1877), wherein, construing recording and dower statutes very similar to the South Carolina statutes, the court said (at p. 187), "at common law, title to land passed by a duly executed deed of conveyance. Under the statutes of Indiana, the title passes by the delivery of such deed, subject to be divested in consequence of the negligence of the grantee, in failing to perform, in due time, a certain act, required of him after the delivery to him of the deed, viz.: filing the same in the proper recorder's office for record.

"It will be here observed, that the wife does not take title [to her dower interest] by a conveyance to her, but by operation of law, through a conveyance to her husband. She must therefore take it subject to all conditions and infirmities attaching to it in the hands of her husband. Her title cannot, in reason, be more perfect than his, from which hers is derived. . . . [W]hen he fails to perform the act of filing it in the recorder's office, whereby his title is lost, as against a *bona fide* purchaser from his grantor, that of his wife must, under the statutes, go with his. There is no equity in giving her preference over such a purchaser. The object of the statute, in preventing secret liens and claims of title, would be thwarted by any other construction. Sound policy requires the adoption of the construction we give the statutes." However, the widow of a deceased grantee under an unrecorded deed is entitled to dower as against subsequent encumbrancers and purchasers for value with notice of the unrecorded deed. *Sutton v. Jarvis*, 31 Ind. 265 (1869); *Brannon v. May*, 42 Ind. 92 (1873); *Johnson v. Miller*, 47 Ind. 376 (1874).

68. See pp. 356-365, *supra*.

interests may arise by oral gift⁶⁹ or sale,⁷⁰ estoppel,⁷¹ constructive⁷² or resulting trust,⁷³ rights of reformation of an instrument,⁷⁴ the right of reinstatement of a mortgage discharged by reason of mistake or fraud,⁷⁵ the right of a grantor to establish that his deed in form an absolute conveyance was intended as a mortgage,⁷⁶ and possibly in other ways. It would seem that the specification in the South Carolina statute⁷⁷ of interests in land required to be recorded does not encompass interests created in any of the above ways, and that as to such interests, therefore, priorities must be determined under the rules applicable in the absence of statute.⁷⁸ In so far as these

69. As to parol gifts of land, see *Knight v. Stroud*, 212 S. C. 39, 46 S. E. 2d 169 (1948), s. c. 214 S. C. 437, 53 S. E. 2d 72 (1949); Note, 2 S. C. L. Q. 185 (1949).

70. As to parol sales of land, see Annot., 101 A. L. R. 923 (1936); Note, 8 YEARBOOK OF THE SELDEN SOCIETY 65 (1947).

71. See, among other cases, *Tarrant v. Terry*, 1 Bay 239 (S. C. 1792); *Marines v. Goblet*, 31 S. C. 153, 9 S. E. 803 (1889); *Latimer v. Marchbanks*, 57 S. C. 267, 35 S. E. 481 (1900); *Southern Ry. v. Day*, 140 S. C. 388, 138 S. E. 870 (1926); *Piedmont and Northern Ry. v. Henderson*, 216 S. C. 98, 56 S. E. 2d 740 (1949).

72. Among other South Carolina cases, see *All v. Prillaman*, 200 S. C. 279, 20 S. E. 2d 741, 159 A. L. R. 981 (1942); *Searson v. Webb*, 208 S. C. 453, 38 S. E. 2d 654 (1946).

73. *Larisey v. Larisey*, 93 S. C. 450, 77 S. E. 129 (1913). See *Caulk v. Caulk*, 211 S. C. 57, 43 S. E. 2d 600 (1947); *Legendre v. South Carolina Tax Commission*, 215 S. C. 514, 56 S. E. 2d 336 (1949).

74. Among other South Carolina cases, see *Austin v. Hunter*, 85 S. C. 472, 67 S. E. 734 (1910); *Sullivan v. Moore*, 92 S. C. 305, 75 S. E. 497 (1912); *Byrd v. O'Neal*, 106 S. C. 346, 91 S. E. 293 (1917); *Mathis v. Hair*, 112 S. C. 320, 99 S. E. 810 (1919).

75. Among other South Carolina cases, see *Hutchinson v. Fuller*, 67 S. C. 280, 45 S. E. 164 (1903); *Young v. Pitts*, 155 S. C. 414, 152 S. E. 640 (1930); *McCraney v. Morris*, 170 S. C. 250, 170 S. E. 276 (1933); *Maxwell v. Epton*, 177 S. C. 184, 181 S. E. 16 (1935). A mortgage discharged by reason of mistake or fraud will not be reinstated against a subsequent purchaser for valuable consideration without notice of the mistake or fraud. *City Council of Charleston v. Ryan*, 22 S. C. 339 (1885); *Quattlebaum v. Black*, 24 S. C. 48 (1885); *Werber v. Cain*, 71 S. C. 346, 51 S. E. 123 (1905); *Gullick, Probate Judge, v. Slaten*, 169 S. C. 244, 168 S. E. 697 (1933).

76. *Jones v. Hudson*, 23 S. C. 494 (1885); *Shuford v. Shingler*, 30 S. C. 612, 8 S. E. 799 (1889); *Buchanan v. Buchanan*, 38 S. C. 410, 17 S. E. 218 (1893); *Bristow v. Rosenberg*, 45 S. C. 614, 23 S. E. 957 (1896); *Blackwell v. Mtg. Co.*, 65 S. C. 105, 43 S. E. 395 (1902); *Francis v. Francis*, 78 S. C. 178, 58 S. E. 804 (1907); *Manigault v. Lofton*, 78 S. C. 499, 59 S. E. 534 (1907); *Folk v. Brooks*, 91 S. C. 7, 74 S. E. 46 (1912); *Lodge No. 13, Joint Stock Co. v. Brown*, 112 S. C. 468, 100 S. E. 144 (1919); *Mason v. Finley*, 129 S. C. 367, 124 S. E. 780 (1924); *Jones v. Eichholz*, 212 S. C. 411, 48 S. E. 2d 21 (1948).

77. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-101, quoted at p. 355, *supra*.

78. See pp. 350-351, *supra*, for a discussion of priorities in the absence of statute.

interests are treated as legal ones,⁷⁹ it appears that they would prevail over subsequent interests created in favor of bona fide purchasers for value without notice.⁸⁰ On the other hand, in so far as the interests created by any of the above transactions are equitable,⁸¹ as to such interests the equitable doctrine of bona fide purchase seems still in effect, and a subsequent purchaser for value of the legal title without notice of the equity will take free thereof.⁸² Whether or not possession of the land by the equitable claimant is sufficient to charge the subsequent purchaser with notice of the equity is a query which later will be considered.⁸³

IV

PARTIES PROTECTED BY THE RECORDING ACT

A. *In general*

The text of the recording act provides that an instrument required thereby to be recorded only from the date of its recording "shall be valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable consideration without notice. . . ."⁸⁴ The following treatment of parties protected by the recording act will consider first, purchasers for valuable consideration, second, subsequent creditors, and third, the notice which will remove a party from the protection of the act.

79. Although equitable in origin, estoppel *in pais* is a legal issue to be tried by a jury. See *Southern Railway v. Howell*, 89 S. C. 391, 71 S. E. 972 (1911), and the cases therein cited; *Piedmont and Northern Ry. Co. v. Henderson*, 216 S. C. 98, 56 S. E. 2d 740 (1949). However, it seems that despite the fact that equitable defenses or doctrines have been adopted by the law, they do not become legal in the sense that they cease to be subject to the doctrine of bona fide purchase of the legal title. See 2 WALSH, REAL PROPERTY § 226 p. 525; WALSH, EQUITY 90-94. In South Carolina a parol gift of land not perfected by adverse possession for the statutory period can create only an equitable interest. *Knight v. Stroud*, 212 S. C. 39, 46 S. E. 2d 169 (1948), s. c. 214 S. C. 437, 53 S. E. 2d 72 (1949). A parol contract for the sale of land is enforceable only in equity. See *White v. McKnight*, 146 S. C. 59, 143 S. E. 552, 59 A. L. R. 1297 (1928); *Carson v. Coleman*, 208 S. C. 406, 38 S. E. 2d 147 (1945); Annot., 59 A. L. R. 1305 (1929). For authorities to the effect that interests created by way of constructive and resulting trust, rights of reformation of an instrument, and reinstatement of a mortgage are equitable, see notes 69 through 75, *supra*.

80. See p. 350, *supra*.

81. See note 79, *supra*.

82. See p. 350, *supra*.

83. See p. 387, *infra*.

84. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-101.

*B. Purchaser for valuable consideration*⁸⁵

The rule in South Carolina as to who can qualify as a purchaser for valuable consideration under the recording act has been thus stated: "To entitle one to take advantage of the plea that he is a purchaser for value without notice, it is necessary for him to show three things: (1) That the purchase money was actually paid before notice of outstanding incumbrances or equities (giving security for the payment is not sufficient, nor is past indebtedness a sufficient consideration); (2) that he has purchased and acquired the legal title, or the best right to it, before notice of outstanding incumbrances or equities; and (3) that he purchased *bona fide* without notice."⁸⁶

Value must have been paid by the purchaser, and "good" consideration as distinguished from "valuable" consideration is insufficient to sustain the plea.⁸⁷ While the consideration paid need not represent the full market value of the land in order that the purchaser be protected, yet if the consideration paid or recited is merely a nominal one it seems that the grantee cannot claim as a purchaser for value.⁸⁸ Moreover, the fact that the consideration paid is grossly inadequate may be some evidence to the effect that the purchase was not in good faith and without notice.⁸⁹

The consideration must have been paid rather than merely secured to be paid before notice of the outstanding prior in-

85. A mortgagee is entitled to the protection afforded in equity to purchasers for valuable consideration without notice. *Haynsworth v. Bischoff*, 6 S. C. 159 (1875). Likewise a mortgagee is a purchaser under the recording act. *Norwood v. Norwood*, 36 S. C. 331, 15 S. E. 382, 31 Am. St. Rep. 875 (1892).

86. Mr. Justice Blease in *Kirton v. Howard*, 137 S. C. 11, 36, 134 S. E. 859 (1926), quoted in *Cook v. Knight*, 173 S. C. 278, 283, 175 S. E. 506 (1934), and in *Jones v. Eichholz*, 212 S. C. 411, 422, 48 S. E. 2d 21 (1948).

87. *Cook v. Knight*, 173 S. C. 278, 175 S. E. 506 (1934). See *Wamburzee v. Kennedy*, 4 Des. 474, 478 (S. C. 1814); *Swan v. Ligan*, 1 McC. Eq. 227, 232 (S. C. 1826). A devisee is not a purchaser for value and takes subject to an unrecorded lease executed by the testator. *First Presbyterian Church v. York Depository*, 203 S. C. 410, 27 S. E. 2d 573 (1943).

88. 5 TIFFANY, REAL PROPERTY § 1301 (3rd ed. 1939); 4 AMERICAN LAW OF PROPERTY § 17.10. In *Cook v. Knight*, 173 S. C. 278, 175 S. E. 506 (1934), the deed (by an aunt to her niece) recited a consideration of "one dollar and love and affection." The niece was held not to be a purchaser for value, the court finding it to be conceded by the litigants that the recited consideration had not been paid and that the grantee was a mere volunteer.

89. 5 TIFFANY, REAL PROPERTY § 1301 (3rd ed. 1939). See *Cruger v. Daniel*, McM. Eq. 157, 197 (S. C. 1841).

terest, or else the subsequent grantee cannot qualify as a purchaser protected under the recording act.⁹⁰ Thus the subsequent grantee's promissory note in the hands of his grantor as payee is not value within the requirement of the rule, since the court can relieve the grantee maker from payment of his obligation upon a showing that title to the property has failed.⁹¹ If the instrument representing the purchase price is nonnegotiable, the same result will follow even though the grantor has assigned the instrument before notice to the grantee of the outstanding prior interest, since defenses available to the obligor against the assignor can be asserted against the assignee.⁹² However, if the note is a negotiable one, it

90. *Dillard v. Crocker*, Speers Eq. 20 (S. C. 1842); *Garrett v. Garrett*, 1 Strob. Eq. 96 (S. C. 1846). See cases cited in note 86, *supra*. In *Tuten v. McAlhane*, 106 S. C. 328, 91 S. E. 328 (1917), a grantee of land, who had obtained his deed by undue influence, subsequently conveyed a portion of the land to a bona fide purchaser who paid a part of the purchase price and gave a purchase money mortgage securing a note for the balance. After the death of the defrauded grantor his heirs sued to set aside both deeds. The circuit court set aside the deed to the fraudulent grantee, but refused to set aside the latter's conveyance of part of the tract to the subsequent purchaser. Instead, the fraudulent grantee was required to account for the cash portion of the purchase money he had been paid, and to transfer the note and mortgage securing the balance thereof to the administrator of the deceased grantor. On appeal only by the fraudulent grantee the circuit decree was affirmed.

An optionee of land is not a purchaser for value. *Blackwell v. Mtg. Co.*, 65 S. C. 105, 115, 43 S. E. 395 (1902) (circuit court decree).

91. 5 *TIFFANY, REAL PROPERTY* § 1303 (3rd ed. 1939); 4 *AMERICAN LAW OF PROPERTY* § 17.10. Annots., 109 A. L. R. 163, 170 (1937); 124 A. L. R. 1259 (1940). In *Richardson v. Chappell*, 6 S. C. 146 (1875), a purchaser from a devisee was protected as a bona fide purchaser without notice of the claims of creditors of the testator under Statutes 3 and 4 W. & M. Ch. 14 (CODE OF LAWS OF SOUTH CAROLINA, 1952 § 19-704), despite the fact that the purchase price was in part represented by notes of the purchaser payable to the devisee. This case would seem to have no application where the question of bona fide purchase arises under either the equitable doctrine or the recording act, rather than under the Statutes 3 and 4 W. & M. Ch. 14.

In *Hardin v. Melton*, 28 S. C. 38, 45, 4 S. E. 805 (1888), it is suggested by way of a dictum that a grantee who merely has given security to the grantor for payment of the purchase price may be treated as a purchaser for value if the deed contains no covenants for title. The suggestion seems meritorious if collision is to be avoided with the rule that "... it is one of the most settled doctrines of the law that a purchaser who has received no covenants which cover the defect or incumbrance can neither detain the purchase money nor recover it back if already paid. Unless there has been fraud or mistake, he is absolutely without relief against his vendor, either at law or in equity." *RAWLE, COVENANTS FOR TITLE* § 321 (5th ed. 1887). See Annots., 5 L. R. A. 45 (1889); 7 L. R. A. (N. S.) 445, 458 (1907); 21 L. R. A. (N. S.) 363, 385 (1909).

92. Among other South Carolina cases, see *Maybin v. Kirby*, 4 Rich. Eq. 105, 113 (S. C. 1851); *Moffatt v. Hardin*, 22 S. C. 9, 29 (1884);

seems that the grantee will be protected as a purchaser for value if the grantor has transferred it to a holder in due course prior to notice to the grantee of the outstanding prior interest.⁹³

If the purchaser has paid the entire purchase price before notice of an outstanding prior interest but has not acquired the title, subsequent notice of the outstanding interest before acquisition of the legal title as a general rule will defeat the purchaser's claim to protection under the recording act.⁹⁴

If the purchaser has acquired the legal title and paid part but not all of the purchase price before notice of the outstanding prior interest, it seems the better view is that he should be protected to the extent of the payments made by him before receiving notice.⁹⁵ However, it may be that this view

Trimmier v. Valley Falls Mfg. Co., 85 S. C. 13, 16, 66 S. E. 1055 (1910). 2 WILLISTON, CONTRACTS § 432 (rev. ed. 1936).

93. 4 AMERICAN LAW OF PROPERTY § 17.10; 5 TIFFANY, REAL PROPERTY § 1303 (3rd ed. 1939).

94. South Carolina cases to the effect that the legal title must have been acquired before notice of the outstanding equity include *Cruger v. Daniel*, McM. Eq. 157 (S. C. 1841); *Shultz v. Carter*, Speers Eq. 533 (S. C. 1844); *Bush v. Bush*, 3 Strob. Eq. 131 (S. C. 1849); *Brown v. Wood*, 6 Rich. Eq. 155 (S. C. 1853); *Lynch v. Hancock*, 14 S. C. 66 (1880); *Kirton v. Howard*, 137 S. C. 11, 134 S. E. 859 (1926). 4 AMERICAN LAW OF PROPERTY § 17.10; 5 TIFFANY, REAL PROPERTY § 1306 (3rd ed. 1939). But even though the purchaser has not acquired the legal title he will be protected if he has "the best right to it." Among other South Carolina cases see *Black v. Childs*, 14 S. C. 312, 318 (1880); *Kirton v. Howard*, 137 S. C. 11, 36, 134 S. E. 859 (1926) (quoted at p. 368, *supra*). For discussion of what is meant by "the best right" to the legal title, see 5 TIFFANY, REAL PROPERTY § 1261 (3rd ed. 1939); 4 BOGERT, TRUSTS & TRUSTEES Part 1 § 885; 2 SCOTT, TRUSTS § 312; RESTATEMENT, TRUSTS § 312.

Examples from other jurisdictions include the purchaser at an execution sale who receives notice after payment of the purchase price but before execution and delivery of the sheriff's deed. *Duff v. Randall*, 116 Cal. 226, 48 Pac. 66, 58 Am. St. Rep. 153 (1897), and other cases cited in 2 SCOTT, TRUSTS § 312, note 5. But compare *Bank of the State of S. C. v. S. C. Mfg. Co.*, 3 Strob. 190 (S. C. 1848); *Leger v. Doyle*, 11 Rich. 109 (S. C. 1857). The purchaser under a deed invalid for want of written acknowledgment who obtained the signature of the acknowledging officer after notice has likewise been protected. *Hume v. Dixon*, 37 Ohio St. 66 (1881). Also it seems that a purchaser who has paid the purchase price but at the time he receives notice has not yet obtained possession of a deed delivered in escrow will be protected. See *Dodds v. Hills*, 2 H. & M. 424, 427 (1865). 4 BOGERT, TRUSTS & TRUSTEES Part 1 § 885; 2 SCOTT, TRUSTS § 312.

No South Carolina cases illustrative of the best right exception to the general rule have been found. But see *Sweatman v. Edmunds*, 28 S. C. 58, 5 S. E. 165 (1888), which may represent a very questionable application of the exception.

95. 4 AMERICAN LAW OF PROPERTY § 17.10; 5 TIFFANY, REAL PROPERTY § 1305 (3rd ed. 1939); Annots., 109 A. L. R. 163, 166 (1937); 124 A. L. R. 1259, 1261 (1940). See RESTATEMENT, TRUSTS § 303.

is not law in South Carolina, and that in this state a purchaser who has paid but part of the purchase price before notice to no extent will be protected.⁹⁶

By virtue of statute⁹⁷ a recorded mortgage for future advances (either obligatory or at the lender's option) enjoys priority over subsequent creditors and purchasers⁹⁸ without notice to the same extent as if such advances had been made as of the date of execution of the mortgage.⁹⁹ However, it is not clear whether or not, in order to comply with the provisions of the statute, a mortgage must state that it is one for future advances and also the maximum amount to be secured thereby.¹⁰⁰

In South Carolina the rule seems to be that a conveyance taken solely in satisfaction of, or a mortgage taken as security for, a pre-existing debt does not qualify the creditor as a purchaser for value.¹⁰¹ Furthermore, it may be that the

96. *Law v. Smith*, 120 S. C. 468, 113 S. E. 298 (1922). See *Black v. Childs*, 14 S. C. 312, 318 (1880). In *Zorn v. RR*, 5 S. C. 90, 96 (1874), the decree of the circuit judge contains the following: "If the purchaser has paid no part of it [the purchase price], then the plea is null; if he has paid a part of it, he is entitled to protection pro tanto." Cf. *Wagner v. Sanders*, 49 S. C. 192, 27 S. E. 68 (1897). The statement in the *Black* case that the full consideration must have been paid is dictum. It seems that the statement in the *Law* case may likewise be treated, if the court so desires, since the decision is readily explainable on the ground that the purchaser had notice at the time of sale. Statements in *Ellis v. Woods*, 9 Rich. Eq. 19, 25 (S. C. 1856), and *Ellis v. Young*, 31 S. C. 322, 325, 9 S. E. 955 (1899), even if assumed to imply that a purchaser acquiring the legal title but not paying the full consideration before notice will not be protected pro tanto, are mere dicta.

97. 38 STAT. 1475 (1934), embodied in CODE OF LAWS OF SOUTH CAROLINA, 1952 § 45-55.

98. It would seem that by judicial construction the protection of the statute should not be extended to advances made after actual notice of a conveyance of the land by the mortgagor.

99. Prior to the statute a mortgage given to secure future advances was postponed to a later mortgage given for a present consideration, as to advances made by the first mortgagee after notice of the second mortgage. See *National Bank of Chester v. Gunhouse*, 17 S. C. 489 (1882). As to whether or not the recording of the later mortgage afforded constructive notice to the prior mortgagee, the South Carolina cases are not harmonious. See discussion of these cases in note 194, *infra*.

100. Absent the statute, a mortgage given to secure unlimited future advances is valid. *Ex parte American Fertilizing Co.*, 122 S. C. 171, 115 S. E. 236 (1922). Annot., 81 A. L. R. 631 (1932).

101. *Zorn v. RR*, 5 S. C. 90 (1874); *Haynsworth v. Bischoff*, 6 S. C. 159 (1875); *Marsh v. Ramsey*, 57 S. C. 121, 35 S. E. 433 (1900); *Heyward-Williams Co. v. Zeigler*, 106 S. C. 425, 91 S. E. 298 (1917); *Oliver v. McWhirter*, 112 S. C. 555, 100 S. E. 533 (1919). See *Young v. Pitts*, 155 S. C. 414, 421, 152 S. E. 640 (1930). *Contra*: *Norwood v. Norwood*,

grantee of a deed executed both for a present consideration and in satisfaction of an antecedent indebtedness to no extent will be protected as a bona fide purchaser.¹⁰² However, it seems that a mortgagee who takes a mortgage securing both a present loan as well as an antecedent indebtedness will be protected to the extent of the present loan.¹⁰³

Whether or not a mortgage given a creditor in consideration of his agreement to extend the time for payment of an antecedent debt or to forbear in bringing suit qualifies the creditor as a purchaser for value appears not to have been decided in South Carolina.¹⁰⁴ In most states it seems that under these circumstances the creditor will be protected as a purchaser for value.¹⁰⁵

A third party purchaser of land at an execution sale apparently takes free from any equitable claim or claims based on unrecorded instruments of which he had no notice, he being entitled to the same protection that is afforded a purchaser at a private sale.¹⁰⁶ However, if the judgment creditor himself purchases at the execution sale it seems that in South Carolina he is not protected as a purchaser for value.¹⁰⁷

36 S. C. 331, 343, 15 S. E. 382, 31 Am. St. Rep. 875 (1892), wherein it is said: "[t]his court, therefore, now announces that a secret mortgage, or a mortgage not recorded, is displaced in lien by a mortgage subsequently delivered and duly recorded, *even if the debt secured by the recorded mortgage is an antecedent indebtedness.*" (Emphasis supplied.) The above statement is quoted with approval in Perkins v. Loan & Exchange Bank, 43 S. C. 39, 47, 20 S. E. 759 (1895), and the same principle is said to be equally applicable to a transfer in satisfaction of an antecedent indebtedness. On this one point the *Norwood* and *Perkins* cases seem to be irreconcilable with the earlier and later South Carolina cases.

102. See *Oliver v. McWhirter*, 112 S. C. 555, 100 S. E. 533 (1919); *Law v. Smith*, 120 S. C. 468, 113 S. E. 298 (1922).

103. *Gibson v. Hutchins*, 43 S. C. 287, 21 S. E. 250 (1895).

104. In *Haynsworth v. Bischoff*, 6 S. C. 159, 168 (1875), the court said: "It will not be necessary to consider whether forbearance alone is sufficient consideration to support the claim of a purchaser for value in equity, for the defendant has not established the existence of any such consideration."

105. Annot., 39 A. L. R. 2d 1088 (1955).

106. *McKnight v. Gordon*, 13 Rich. Eq. 222 (S. C. 1867); *Miles v. King*, 5 S. C. 146 (1873); *Ludden & Bates Southern Music House v. Dusenbury*, 27 S. C. 464, 4 S. E. 60 (1887); *Williams v. Jones*, 74 S. C. 258, 54 S. E. 558 (1906). *Contra*: *Gulf Refining Co. v. McCanless*, 118 S. C. 6, 109 S. E. 801 (1921). This last case is opposed to the great weight of authority in so far as it holds that a stranger purchasing at a sheriff's or judicial sale is not a bona fide purchaser protected by the recording act. See 4 AMERICAN LAW OF PROPERTY § 17.30; 5 TIFFANY, REAL PROPERTY § 1309 (3rd ed. 1939).

107. *Shultz v. Carter*, Speers Eq. 533 (S. C. 1844); *Williams v. Hollingsworth*, 1 Strob. Eq. 103 (S. C. 1846). See *Zorn v. Railroad Company*, 5 S. C. 90, 97 (1874). But cf. *Ingram v. Belk*, 2 Strob. 207 (S. C.

Is a mortgagee purchasing at a foreclosure sale to be treated as a purchaser for value under the recording act? For example,¹⁰⁸ suppose O mortgages Blackacre to M by duly recorded mortgage. Thereafter O purchases from C under an unrecorded conditional sale agreement a furnace which he installs in the residence on Blackacre so as to become a fixture thereto, subject only to C's conditional sale agreement. Thereafter M's mortgage is foreclosed and Blackacre is bid in at the foreclosure sale by M, who takes title without notice of C's unrecorded conditional sale agreement.^{108a} Is M protected as a subsequent purchaser for value without notice of C's lien on the furnace?

If Blackacre had been purchased at the foreclosure sale by B, a third party, it is clear that the recording act would have protected B against the unrecorded conditional sale agreement.¹⁰⁹ As concerns M, the mortgagee, however, it may be argued that he is not a subsequent purchaser since the value paid by him (the mortgage loan) was prior to the unrecorded conditional sale agreement and not subsequent thereto. Analogous to the situation of a judgment creditor purchasing at an execution sale,¹¹⁰ it was held in one case¹¹¹ (which apparently is still controlling)¹¹² that a mortgagee purchasing at a foreclosure sale is not a subsequent purchaser for value, and therefore, that C prevails over M in the hypothetical case put.

1847), holding a purchase by the plaintiff under a voidable execution to be entitled to the same protection afforded a purchase by a stranger. The cases from other jurisdictions are conflicting. See 4 AMERICAN LAW OF PROPERTY § 17.30; 5 TIFFANY, REAL PROPERTY § 1309.

Of course, if the judgment creditor himself is within the protection of the recording act, the fact that he purchased at the execution sale is immaterial. See *Herring & Co. v. Cannon*, 21 S. C. 212 (1884); *Blackwell v. Harrelson*, 99 S. C. 264, 84 S. E. 233 (1914).

108. Another example, suppose O gives M a mortgage drawn to cover after-acquired land. Thereafter O purchases Blackacre from B and gives a purchase money mortgage which B fails to record. Thereafter M's mortgage is foreclosed and Blackacre is bid in at the foreclosure sale by M, who takes title without notice of B's unrecorded purchase money mortgage.

108a. As to the record of a conditional sale agreement or chattel mortgage on fixtures constituting constructive notice to a subsequent purchaser of the realty on which such fixtures are installed, see page 401, *infra*.

109. See *Liddell Co. v. Cork*, 120 S. C. 481, 113 S. E. 327 (1922).

110. See note 107, *supra*.

111. *Zorn v. RR*, 5 S. C. 90 (1874).

112. Two subsequent cases raise some doubt. In *Perkins v. Loan & Exchange Bank*, 43 S. C. 39, 20 S. E. 759 (1895), O gave the assignor of the defendant a duly recorded chattel mortgage covering after-acquired property. Subsequently O purchased certain machinery from the plaintiff under an unrecorded title retention contract. In a contest

C. Purchase from heir or devisee¹¹³

Suppose that O conveys land to A by a deed which A fails to record. Thereafter O dies, whereupon B, in reliance upon O's title of record and without notice of the prior conveyance to A, purchases from O's heir or devisee. There is authority¹¹⁴ holding that in this situation the recording act does not protect B from A's unrecorded deed, on the theory that the conveyance to A having divested O of his entire interest, O's heir or devisee therefore had nothing to convey to B. Such a result is not only unfortunate as a matter of policy, but also rests upon unsound reasoning.^{114a} Accordingly, the view of the cases¹¹⁵ affording protection to B is to be preferred. No

between the plaintiff and the defendant, who as assignee of the chattel mortgage had seized the machinery after default and before notice of the title retention contract, *held*, for the defendant. The ground for the decision seems to be not that a mortgagee purchasing at a foreclosure sale is to be treated as a subsequent purchaser for value, but that a secret lien is displaced by a subsequent lien given as security for an antecedent indebtedness. As authority for this proposition the court relies on *Norwood v. Norwood*, 36 S. C. 331, 15 S. E. 382, 31 Am. St. Rep. 875 (1892). But, as pointed out in note 101, *supra*, on this point the *Norwood* and *Perkins* cases are opposed to both prior and subsequent South Carolina cases.

A later case, *Goodrich Silvertown, Inc. v. Rogers*, 189 S. C. 101, 200 S. E. 91 (1938), apparently construes the *Perkins* case as holding that a mortgagee purchasing at a foreclosure sale is a subsequent purchaser for value. However, such an interpretation of the *Perkins* case is wholly unnecessary in the decision of the *Goodrich* case, and in this latter case the *Perkins* case is discussed only for the purpose of distinguishing the factual situation therein from that presently before the court. For a detailed adverse criticism of the *Perkins* and *Goodrich* cases, see Vandiver, *After-Acquired Personality; Priority; Case Criticism*, 3 YEAR BOOK OF THE SELDEN SOCIETY, Part 2, p. 48 (1939).

113. See generally 5 TIFFANY, REAL PROPERTY § 1278 (3rd ed. 1939); Annot., 65 A. L. R. 360 (1930). Also of interest is Annot., *Right of executor or administrator of insolvent estate to take advantage of failure to record, or file, or refile a conveyance or mortgage executed by his decedent*, 91 A. L. R. 299 (1934).

114. *Hill v. Meeker*, 24 Conn. 211 (1855). For other cases see Annot., 65 A. L. R. 360, 365 (1930). In some of these cases the language of the jurisdiction's recording act was held to necessitate such a result. See *Webb v. Doe*, 33 Ga. 565 (1863).

114a. "It has been considered baffling that a deed executed by the heir of the grantor in an unrecorded deed may, under the Recording Acts, take precedence over the earlier unrecorded conveyance, it being pointed out that since the grantor conveyed all that he had there was nothing to come to the heir on the grantor's death. Of course that argument proved too much, for the grantor himself had no more upon which to base a subsequent deed than the heir had. It is a wholly sufficient answer that the grantor had a power to defeat the unrecorded deed, and that same power became vested in his heir. The power likewise may pass to and be exercised by the devisee . . . of the grantor." Aigler, *The Operation of the Recording Acts*, 22 MICH. L. R. 405, 416 (1924) (Professor Aigler's footnotes are omitted).

115. *Earle v. Fiske*, 103 Mass. 491 (1870); *Reddoch v. Williams*, 129 Miss. 706, 92 So. 831 (1922).

South Carolina case has been found.

D. Protection of a subsequent purchaser against a prior conveyance recorded after execution but before recordation of the subsequent conveyance

Suppose that A, the record owner of land, conveys to B, but before B records A makes a second conveyance to C, who pays value without actual notice¹¹⁶ of the prior conveyance to B. Thereafter B records his conveyance before C records his subsequent one. Will C be protected as against B despite the fact that B first recorded? Although under the recording acts of many states a different result is reached,¹¹⁷ in South Carolina it has been held that C will prevail over B despite the latter's priority of recording.¹¹⁸ However, the South Carolina law on the point recently has been altered by the following amendment^{118a} to the recording statute, enacted on April 24, 1958, approved April 28, 1958:

Provided, however, that in case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate or personal property or both, for valuable consideration without notice, the instrument evidencing such subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or pur-

116. In South Carolina notice of an unrecorded instrument will supply the want of registration. See page 384, *infra*.

117. The recording acts in some states make recordation the sole test of priority between successive grantees of the same land from a common grantor. In such states, therefore, B, having won the race to record, prevails over C. Under the recording acts of other states the priority of a subsequent purchaser depends upon his showing not only a lack of notice at the time of his purchase, but also that he has won the race to record. In these states B having won the race to record, will prevail over C despite C's want of notice at the time of his purchase. The acts of a third group of states make want of notice of the prior conveyance the sole test of priority between successive grantees, and therefore give priority to C as a subsequent purchaser without notice, despite his failure first to record. Formerly the South Carolina act was of the third type. See note 118, *infra*. However, since the amendment of 1958 (note 118a, *infra*) the South Carolina act is of the second type.

Recording acts of the first type commonly are referred to as "race" acts, of the second type as "notice-race" acts, and of the third type as "notice" acts. For a detailed discussion of the types of recording acts and a classification of the acts of the various states see 4 AMERICAN LAW OF PROPERTY § 17.5. See also Annot., 32 A. L. R. 344 (1924).

118. *Williams v. Beard*, 1 S. C. 309 (1870); *Turpin v. Sudduth*, 53 S. C. 295, 31 S. E. 245 (1898); *S. C. National Bank v. Guest*, ___ S. C. ___, 102 S. E. 2d 215 (1958). See Annot., 32 A. L. R. 344, 351 (1924), discussing the South Carolina cases.

118a. Senate Bill No. 762, as amended, amending CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-101.

chaser for value without notice, and the priority shall be determined by the time of filing for record.

It seems improbable that the amendment will be held to affect instruments executed prior to the date of its approval.^{118b} What effect, if any, it has in bankruptcy and receivership proceedings,^{118c} as well as its possible application to other issues arising under the recording statute,^{118d} are questions yet to be determined.

E. Subsequent creditors

The earliest South Carolina recording statute, the Act of 1698,¹¹⁹ made no provision for the protection of creditors, and under the language of this act it was held that unrecorded mortgages and deeds of land did not lose their priority as against subsequent judgment creditors.¹²⁰ The Act of 1785¹²¹ did purport to make provision for the protection of creditors, but despite the language thereof the same construction was placed upon it as previously had been given the Act of 1698.¹²²

In 1843¹²³ the law as to the registration of mortgages was altered by a provision "[t]hat no mortgage . . . of real estate,

118b. Unless provision is made for its retrospective operation, a recording statute usually is construed not to apply to instruments executed prior to its enactment. See Annot., 121 A. L. R. 909, 911 (1939).

118c. See text supported by notes 153, 154, *infra*. Since the amendment makes no mention of simple contract creditors, it is improbable that their rights are thereby affected.

118d. For example, it has been said that in the situation discussed in section V, C. 4, page 396, *infra*, B, because he recorded before D, necessarily prevails over the latter under the notice-race type statute established in South Carolina by the amendment of 1958. See 4 AMERICAN LAW OF PROPERTY § 17.22; Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. PA. L. REV. 125, 391 (1945). Such a result, however, clearly is subversive of the proper functioning of the recording system. Cf. note 210, *supra*. In this situation it seems that a court should construe a notice-race statute to require not mere priority of filing for record, but priority of record *in the chain of title* as well. Should the amendment be construed not to require priority of record within the chain of title, it would be tantamount to a statutory affirmation in South Carolina of the rule of *Van Diviere v. Mitchell*, note 203, *infra*, a consummation most assuredly to be avoided. Also, if the amendment requires mere priority of record, it would seem that the desirable rule of *Richardson v. Atlantic Coast Lumber Corporation* (note 206, *infra*, and accompanying text) is thereby altered, a result surely not intended as a consequence of the amendment.

119. 2 STAT. 137 (1698).

120. *Ash v. Ash*, 1 Bay 304 (S. C. 1793); *Ashe v. Livingston*, 2 Bay 80 (S. C. 1797); *Penman v. Hart*, 2 Bay 251 (S. C. 1800); *Barnwell v. Porteus*, 2 Hill Eq. 219 (S. C. 1835).

121. 7 STAT. 232 (1785).

122. *Smith v. Smith*, 1 McC. Eq. 134 (S. C. 1825); *Barnwell v. Porteus*, 2 Hill Eq. 219 (S. C. 1835); *Steele v. Mansell*, 6 Rich. 437 (S. C. 1852).

123. 11 STAT. 277 (1843).

shall be valid so as to affect the rights of subsequent creditors or purchasers for valuable consideration, without notice, unless the same shall be recorded . . . within sixty days from the execution thereof. . . .” The construction placed upon this provision was that thereunder a subsequent creditor of the mortgagor, who reduced his claim to judgment without notice of the mortgage, acquired a priority as against the mortgagee of a prior mortgage recorded out of time.¹²⁴

Thereafter came the Act of 1876,¹²⁵ made applicable both to deeds and mortgages, whereby it was provided that such instruments “shall be valid, so as to affect . . . the rights of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days . . . *Provided, nevertheless, that . . . if recorded subsequent to the expiration of . . . forty days, shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice only from the date of such record.*” Construing this act, it was held¹²⁶ by a divided court that under the provisions thereof an unrecorded mortgage has priority over a judgment against the mortgagor based upon a debt contracted prior to the execution of the mortgage but entered subsequent thereto, the judgment creditor being construed to be a prior rather than a subsequent creditor. This construction of the recording act is present day law in South Carolina.¹²⁷

Under the Act of 1876¹²⁸ it further was held¹²⁹ that a mortgagee whose mortgage was recorded late took priority over

124. See *McKnight v. Gordon*, 13 Rich. Eq. 222 (1867); *Herring & Co. v. Cannon*, 21 S. C. 212, 53 Am. Rep. 661 (1884). In *Bloom v. Simms*, 27 S. C. 90, 3 S. E. 45 (1887), it was held that under the Act of 1843 a mortgage recorded after the sixty days allowed by the act was void as to a subsequent purchaser for value without actual notice, the tardy record of the mortgage affording no record notice to such purchaser.

125. 16 STAT. 92 (1876).

126. *Carraway v. Carraway*, 27 S. C. 576, 5 S. E. 157 (1888).

127. *Armstrong v. Carwile*, 56 S. C. 463, 35 S. E. 196 (1900); *Prudential Insurance Co. v. Wadford*, 232 S. C. —, — S. E. 2d — (1958). Cf. *McGhee v. Wells*, 57 S. C. 280, 35 S. E. 529, 76 Am. St. Rep. 567 (1900); *Williams v. Jones*, 74 S. C. 258, 54 S. E. 558 (1906); *Finance Corporation v. McGhee*, 142 S. C. 380, 140 S. E. 691 (1927). In *Tucker v. Hudgens*, 132 S. C. 374, 129 S. E. 77 (1925), the issue was as to priority between a chattel mortgage and the lien of a pledge. The result reached therein, which is inconsistent with that reached in the above cases, would seem to be based upon a no longer existent provision of the recording act, *i. e.*, the amendment of 1914 (see text supported by note 137, *infra*).

128. 16 STAT. 92 (1876).

129. *King v. Fraser*, 23 S. C. 543 (1885); *S. C. Loan and Trust Co. v. McPherson*, 26 S. C. 431, 2 S. E. 267 (1887).

creditors advancing credit subsequent to the execution of the mortgage and without notice thereof, but whose claims were not reduced to judgment prior to recordation of the mortgage, the statute being construed to afford no protection to unsecured creditors.

In 1898¹³⁰ the general recording act was amended to extend the protection thereof expressly to simple contract creditors. Since the amendment (which is still effective)¹³¹ a simple contract creditor whose debt is contracted after the execution of a deed or mortgage of land, but before its recordation, will prevail as against the grantee or mortgagee if the debt is reduced to judgment and entered¹³² prior to notice of or the recordation of the deed or mortgage.¹³³

Suppose that the simple contract debt incurred subsequent to the execution of a mortgage but prior to its recordation is not reduced to judgment until after notice of or the recordation of the mortgage. Under these circumstances, which of the two claimants has priority? Prior to the amendment of 1898,¹³⁴ which expressly undertook to extend the protection of the recording act to simple contract creditors, it had been held in *King v. Fraser*¹³⁵ that the mortgage took priority. However, after that amendment the court held in *Brown v. Sartor*¹³⁶ that the mortgage and judgment had equal rank.

In 1914 the recording act was further amended by the proviso "That the recording and record of the above mentioned deeds and instruments of writing subsequent to the expiration of said ten days shall, from the date of such record, have the same effect as to the rights of all creditors and purchasers

130. 22 STAT. 746 (1898).

131. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-101.

132. In South Carolina a judgment constitutes a lien on the real estate of the judgment debtor from the time the judgment or a transcript thereof is indexed and entered upon the book of abstracts of judgments in the county where the real estate is situate. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-1561. However, a lien on personal property of the judgment debtor is created only by execution and levy. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 10-1711 and cases thereunder cited.

133. *Blackwell v. Harrelson*, 99 S. C. 264, 84 S. E. 233 (1914). See *Brown v. Sartor*, 87 S. C. 116, 120, 69 S. E. 88 (1910). A purchaser at an execution sale under the judgment thus obtained will prevail despite actual notice of the prior instrument at the time of his purchase of the land. *Herring & Co. v. Cannon*, 21 S. C. 212 (1884); *Blackwell v. Harrelson*, *supra*. Apparently the result was the same prior to the amendment of 1898, under both the Act of 1843 and the Act of 1876. See the first two cases cited in note 124, *supra*.

134. 22 STAT. 746 (1898).

135. 23 S. C. 543 (1885).

136. 87 S. C. 116, 69 S. E. 88 (1910).

without notice as if the said deeds or instruments of writing had been executed and delivered on the date of the record thereof."¹³⁷ The interpretation of the act as thus amended was that the rule of *King v. Fraser*¹³⁸ had been reinstated so that, subsequent to the amendment of 1914, simple contract creditors who extended credit after the execution of a mortgage but who did not obtain judgment liens until after its recordation were postponed to the lien of the mortgage.¹³⁹

Until 1925 the South Carolina recording statute contained a period of grace (varied from time to time throughout the years) during which an instrument might be recorded within a certain time after its execution and still retain its priority as if recorded at the moment of its execution. In that year the grace period was eliminated by certain changes in the language of the statute, including the deletion of the amendment of 1914, and the substitution in its stead of the following: "Provided, That a deed . . . or other written instrument shall rank as to the priority thereof from the filing of the same for record. . . ."¹⁴⁰ Since the Act of 1925 it conceivably might have been held that the law once again is as it was announced before the amendment of 1914 in *Brown v. Sartor*.¹⁴¹ The cases¹⁴² decided since the amendment, however, have continued to apply the rule of *King v. Fraser*.¹⁴³ In two of these

137. 28 STAT. 482 (1914).

138. Note 135, *supra*.

139. *In re Saunders & Co.*, 272 Fed. 1003 (E. D. N. C. 1921); *In re Sylecau Mfg. Co.*, 17 F. 2d 503 (W. D. S. C. 1922); *Firestone Tire & Rubber Co. v. Cross*, 17 F. 2d 417 (4th Cir. 1927); *Carroll v. Cash Mills*, 125 S. C. 332, 118 S. E. 290 (1923); *Tucker v. Hudgens*, 132 S. C. 374, 129 S. E. 77 (1925); *Baugh & Sons v. Graham*, 150 S. C. 398, 148 S. E. 220 (1929); *Sims v. Ezell*, 171 S. C. 256, 172 S. E. 129 (1933). See *Little v. Mangum*, 17 F. 2d 44, 45 (4th Cir. 1927). In *Industrial Finance Corp. v. Cappelmann*, 284 Fed. 8, 12 (4th Cir. 1922), the court declared the South Carolina law to be "that the rights of subsequent simple contract creditors for value without notice against conveyances of liens not recorded as required by the statute accrue when the credit is extended, and cannot be defeated by any subsequent action of the holder of the secret conveyance or lien." However, in *Firestone Tire & Rubber Co. v. Cross*, *supra*, it is stated (17 F. 2d 417, 422) that in the *Cappelmann* case "the court did not consider the effect on the registration statutes of the amendment of 1914. . . ."

140. 34 STAT. 1 (1925).

141. Note 139, *supra*.

142. *Firestone Tire & Rubber Co. v. Cross*, 17 F. 2d 417 (4th Cir. 1927); *Baugh & Sons v. Graham*, 150 S. C. 398, 148 S. E. 220 (1929); *Sims v. Ezell*, 171 S. C. 256, 172 S. E. 129 (1933). See *Tucker v. Hudgens*, 132 S. C. 374, 129 S. E. 77 (1925).

143. Note 135, *supra*.

cases¹⁴⁴ it may be that because of the factual situations involved the statutory law existent before 1925 necessarily was applicable. However, no mention of this fact is made, nor does the court indicate that the law as applied would be inappropriate to a situation arising after the 1925 amendment. A third case¹⁴⁵ seems necessarily to determine that the law was unchanged by the deletion in 1925 of the 1914 amendment, though the opinion makes no reference to this deletion. Thus the present day law apparently is that a simple contract creditor who extends credit after the execution of a mortgage but does not reduce his claim to judgment until after recordation of the mortgage is subordinated thereto.

Must a subsequent creditor claiming the protection of the recording act against a prior unrecorded lien show that credit was advanced by him in reliance upon the debtor's apparently unencumbered interest in the land? While no cases involving liens upon real estate have been found,^{145a} as regards personal property the cases are in conflict, some¹⁴⁶ stating that the creditor need not have relied upon the debtor's apparent interest in the chattel, while others¹⁴⁷ are to the effect that unless credit was extended in reliance upon the creditor's ostensible interest in the chattel, the subsequent creditor is not entitled to protection of the recording act. On the basis of these decisions the rule as to real property would seem doubtful.

144. *Firestone Tire & Rubber Co. v. Cross*, 17 F. 2d 417 (4th Cir. 1927); *Baugh & Sons v. Graham*, 150 S. C. 398, 148 S. E. 220 (1929).

145. *Sims v. Ezell*, 171 S. C. 256, 172 S. E. 129 (1933).

145a. In *Prudential Insurance Co. v. Wadford*, 232 S. C. ___, ___ S. E. 2d ___ (1958), wherein the issue was as to priority between a mortgage of land and a judgment, the court states by way of dictum "that the recording statute was intended to protect, against the lien of an unrecorded mortgage, persons who, without notice of it, subsequent to its execution might reasonably have extended credit to the mortgagor, or purchased the mortgaged property, *in reliance upon his apparently unencumbered ownership*," (italics added) citing *Carroll v. Cash Mills*, note 147, *infra*.

146. *Wardlaw v. Troy Oil Mill*, 74 S. C. 368, 54 S. E. 658, 114 Am. St. Rep. 1004 (1906). See *Fidelity Trust and Mfg. Co. v. Davis*, 158 S. C. 400, 155 S. E. 622 (1930). Cf. *In re Smith*, 48 F. Supp. 866 (E. D. S. C. 1943), discussed in note 153, *infra*. Cf. *Andrews v. Hurst*, 163 S. C. 86, 161 S. E. 331 (1931), to the effect that a tax being a debt due the State, the State is a creditor entitled to the protection of the bailment statute (CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-308). See *Stephens v. Hendricks*, 226 S. C. 79, 83 S. E. 2d 634 (1954). In this situation it seems that the State need not establish reliance upon the taxpayer's ostensible ownership.

147. *Carroll v. Cash Mills*, 125 S. C. 332, 118 S. E. 290 (1923). See *Finance Corporation of America v. McGhee*, 142 S. C. 380, 140 S. E. 691 (1927).

Suppose that A, for valuable consideration, gives a note to B, secured by an unrecorded mortgage of land. Six months later A, for value, gives an unsecured note to C. Three months after the last transaction A conveys the land to C in satisfaction of the note held by C. If C acquired the title to the land without notice of B's mortgage, is he protected as against the mortgage? As previously seen,¹⁴⁸ a conveyance in consideration of the satisfaction of an antecedent debt is not a conveyance for value within the meaning of the recording act. However, as against the indebtedness secured by the unrecorded mortgage C occupies the position of a subsequent unsecured creditor, whom, since the amendment of 1898,¹⁴⁹ the recording act has purported to protect. Thus, if C had reduced his debt to judgment before notice of B's unrecorded mortgage, the lien of the judgment thus acquired would be prior to that of the unrecorded mortgage.¹⁵⁰ It would seem, therefore, that a conveyance obtained by C in satisfaction of the note likewise would have priority, at least to the extent of C's debt.¹⁵¹ Likewise it would seem that if a mortgage instead of a conveyance

148. See text supported by note 101, *supra*, and following.

149. 22 STAT. 746 (1898).

150. See cases in note 133, *supra*.

151. See *Armour & Co. v. Ross*, 78 S. C. 294, 298, 58 S. E. 941, *reh. den.* 78 S. C. 294, 58 S. E. 1135 (1907). Certain other South Carolina cases seem distinguishable. *Summers v. Brice*, 36 S. C. 204, 15 S. E. 374 (1892), was decided before the Amendment of 1898, which purports to protect simple contract creditors. Also, the debts in satisfaction of which the conveyance was taken were incurred prior to the transaction involving the unrecorded mortgage. In *Marsh v. Ramsay*, 57 S. C. 121, 35 S. E. 433 (1900), the controlling transactions likewise occurred before the Amendment of 1898. *Young v. Pitts*, 155 S. C. 414, 152 S. E. 640 (1930), involved the question of the restoration of the lien of a mortgage satisfied of record by mistake as against the claim of priority by junior mortgagees as purchasers for value. These junior mortgages had been given to secure antecedent debts. The debt of one mortgagee had been incurred prior to the erroneous entry of the mortgage satisfaction, but the opinion does not disclose when the antecedent debt of the other mortgagee had been incurred. The court held that the junior mortgages having been given to secure antecedent debts, the mortgagees therefore could not qualify as purchasers for value. The court did not discuss whether or not one of the mortgagees might be protected as a subsequent creditor, assuming that his debt was created subsequent to the erroneous entry of the mortgage satisfaction. This may have been because the evidence established that both the junior mortgagees had notice of the senior mortgagee's equity of reformation at the time the junior mortgages were taken. Moreover, even if the junior mortgagees technically could have qualified either as purchasers for value or as subsequent creditors under the recording act, it is doubtful whether, under the circumstances, the court would have afforded them priority over the senior mortgage. See the paragraph of the opinion commencing at the bottom of page 419 of 155 S. C.

were taken by C, this later mortgage would have priority over B's unrecorded mortgage.

Suppose that a simple contract creditor extending credit subsequent to the execution of an unrecorded instrument affecting the title to land has not, prior to notice of the instrument, improved his position by taking a conveyance of the land, by securing a mortgage on the land, or by reducing his claim to judgment. Under such circumstances and despite the language of the proviso of 1898¹⁵² purporting to protect simple contract creditors, it seems that such a creditor is not protected except in the case of the bankruptcy of the debtor or the appointment of a receiver. It further seems clear that the simple contract creditor will be protected by the recording act if, prior to the recordation of the unrecorded instrument affecting title to the land, the debtor is adjudicated a bankrupt, in which event the trustee in bankruptcy occupies for the benefit of all creditors of the bankrupt as against the holder of the unrecorded instrument, the position of a lien creditor.¹⁵³ While a receiver of the debtor's assets appointed under the South Carolina procedure is not a purchaser for value, and acquires no greater interest in the property than the debtor had, yet in so far as the receiver represents simple contract creditors extending credit subsequent to and without notice of the unrecorded lien, in the distribution of the assets of the debtor such creditors will have priority over the claimant under the prior unrecorded lien.¹⁵⁴

152. 22 STAT. 746 (1898).

153. The cases to this effect include *Industrial Finance Corp. v. Capplemann*, 284 Fed. 8 (4th Cir. 1922); *In re Tansill*, 17 F. 2d 413 (W. D. S. C. 1922); *In re Smith*, 48 F. Supp. 866 (E. D. S. C. 1943) (bailment of goods not recorded in compliance with the bailment statute CODE OF LAWS OF SOUTH CAROLINA, 1952 § 57-308). In the *Smith* case it was held that the trustee in bankruptcy need not show that subsequent creditors extended credit to the bankrupt in reliance upon his ostensible title to the goods. Since this decision § 70 (c) of the Bankruptcy Act, 11 U. S. C. A. § 70 (c), has been amended to further strengthen the position of the trustee in bankruptcy. See the amendments of 1950 and 1952. In *National Discount Corporation v. Tyson*, 247 F. 2d 18 (4th Cir. 1957), certain chattel mortgages had not been recorded until within a month of the time that the mortgagor was adjudicated a bankrupt. The court held that under the circumstances repossession of the mortgaged goods by the mortgagee constituted a voidable preference. It is unlikely that the 1958 amendment to the South Carolina recording statute affects the rights of simple contract creditors in bankruptcy and receivership proceedings. For text of the amendment see page 375, *supra*.

154. *In re American Slicing Machine Co.*, 125 S. C. 214, 118 S. E. 303 (1923) (interest of conditional vendor under unrecorded title retention contract held subordinate to claims of subsequent simple contract creditors without notice of conditional vendor's interest); *Bradley, State Bank*

V

NOTICE

A. *In general*

Since a relatively early date in the state's judicial history, the law has been settled that notice of an unrecorded instrument will supply the want of registration, that is, that a person who purchases with notice of an unrecorded instrument will not be protected therefrom by the recording act.^{155, 156} Thus the notice which will deprive a subsequent purchaser of protection under the recording act may be either record notice or notice other than from the record. The following treatment will consider first, notice other than from the record, and secondly, the problems incident to record notice.

Examiner v. Guess, 165 S. C. 161, 163 S. E. 466 (1932) (interest of mortgagee under unrecorded real estate mortgage executed by bank held subordinate to claims of persons making subsequent deposits of money and paper for collection).

155. The earliest case found is *Warnock v. Wightman*, 1 Brev. 331 (S. C. 1804), though in *Martin v. Sale*, Bailey Eq. 1, 4 (S. C. 1830), Judge Nott stated "[i]t has been settled in this State, long before any of our printed cases, that notice of a previous conveyance, to a subsequent purchaser, was equivalent to recording." The leading case is *Tart v. Crawford*, 1 McC. 265 (S. C. 1821), s. c. on a subsequent appeal 1 McC. 479 (S. C. 1821). Among many other cases to the same effect, see *McFall v. Sherrard*, Harper 295 (S. C. 1824); *Anderson v. Harris*, 1 Bailey 315 (S. C. 1829).

156. This result was reached despite the fact that our earlier statutes made priority of registration the sole test as between competing claimants, with no exception made in the case of a subsequent grantee with notice of a prior unrecorded conveyance. See 2 STAT. 137 (1698), 3 STAT. 290 (1731), 7 STAT. 232 (1785), the essential provisions of which statutes are set out above at p. 352, 353, *supra*.

In *Tart v. Crawford*, 1 McC. 265, 268 (S. C. 1821), Mr. Justice Richardson thus rationalizes the holding that actual notice will supply the want of registration:

"Whenever the subsequent purchaser has received actual notice of the former conveyance, the end in view has been answered. If with a knowledge of the former conveyance, he will still purchase the land, he commits an act of folly or dishonesty, he must either intend to give away the consideration money, or to defraud the former purchaser of the land, which he knows to have been fairly purchased by him. To permit him to do so, would be to pervert the character of the law, and to make it an engine of fraud instead of a safeguard against it."

This interpretation of the South Carolina statute is similar to that earlier placed by the English Court of Chancery upon the statute of 7 Anne, c. 20 (1708). 4 AMERICAN LAW OF PROPERTY § 17.5 p. 541. See *Warnock v. Wightman*, 1 Brev. 331, 369 (S. C. 1804).

In South Carolina the Act of 1843 (11 STAT. 277) and subsequent acts expressly provide for the protection only of subsequent creditors or purchasers for valuable consideration "without notice". See pp. 353, 354, *supra*.

B. Notice other than from the record

1. Express notice and notice from rumors

The notice which will remove a subsequent purchaser from the protection of the recording act may be express notice of the interest directly communicated to the subsequent purchaser or to his agent,¹⁵⁷ or it may be notice merely of facts sufficient to put the purchaser on inquiry. If proof of explicit notice of the outstanding interest is established, it follows as a matter of law that the subsequent purchaser takes subject to the unrecorded interest.¹⁵⁸ If, however, the circumstances with which it is sought to charge the subsequent purchaser with notice consist merely of less explicit reports or rumors concerning the title, whether or not the purchaser is to be so charged with notice depends upon whether such reports or rumors are those which would attract the attention of a reasonable man and convince him that further investigation of the title was necessary. Thus it has been stated that "[a] person is bound to take notice of these rumors which would attract the attention of the reasonable man, but not of those idle rumors to which a reasonable man would pay no heed."¹⁵⁹ So a purchaser failing to make further investigation of circumstances which would be sufficient to put a reasonably prudent man on inquiry is chargeable with such notice as a reasonably diligent inquiry would have disclosed.¹⁶⁰ However, failure further to investigate reports or rumors which under the circumstances a reasonably prudent man would not

157. *Cruger v. Daniel*, McM. 157, 197 (S. C. 1841); *Aultman v. Utsey*, 34 S. C. 559, 13 S. E. 848 (1891); *Southern Ry. v. Carroll*, 86 S. C. 56, 67 S. E. 4, 138 Am. St. Rep. 1017 (1910); *Oliver v. McWhirter*, 112 S. C. 555, 100 S. E. 533 (1919). However, knowledge obtained by an agent who is engaged in perpetrating a fraud upon his principal will not be imputed to the principal. *Ex parte Mercer*, 129 S. C. 531, 125 S. E. 33 (1924).

158. *Bell v. Bell*, 103 S. C. 95, 87 S. E. 540 (1915), s. c. on an earlier appeal, 99 S. C. 501, 84 S. E. 369 (1914); *McPherson v. McPherson*, 21 S. C. 261 (1884).

159. *Bell v. Bell*, 103 S. C. 95, 100, 87 S. E. 540 (1915), s. c. on an earlier appeal, 99 S. C. 501, 84 S. E. 369 (1914).

160. *Barr v. Kinard*, 3 Strob. 73 (S. C. 1848); *Maybin v. Kirby*, 4 Rich. Eq. 105 (S. C. 1851); *Adickes v. Lowry*, 15 S. C. 123 (1881), s. c. on a prior appeal, 12 S. C. 97 (1879); *Walker v. Taylor*, 104 S. C. 1, 88 S. E. 300 (1916); *Cathcart v. Matthews*, 115 S. C. 1, 104 S. E. 180 (1920), s. c. on earlier appeals, 91 S. C. 464, 74 S. E. 985, Ann. Cas. 1914A 36 (1912), 105 S. C. 329, 89 S. E. 1021 (1916); *Oliver v. McWhirter*, 112 S. C. 555, 100 S. E. 533 (1919), s. c. on a prior appeal, 109 S. C. 353, 96 S. E. 140 (1918); *Kirton v. Howard*, 137 S. C. 11, 134 S. E. 859 (1926). See *Black v. Childs*, 14 S. C. 312 (1880).

so investigate does not constitute notice under the recording act.¹⁶¹ And even though a purchaser has been derelict in further investigating circumstances which a reasonable man would have so investigated, his failure to make inquiry will not deprive the purchaser of the protection of the recording act if such investigation would not have disclosed the unrecorded prior interest.¹⁶²

2. Immediate or remote claimant under a quitclaim deed as a purchaser without notice¹⁶³

Although the law once may have been otherwise,¹⁶⁴ today it would seem settled in South Carolina that the grantee of a quitclaim deed and his successors in interest, if otherwise qualified, are entitled to the plea of bona fide purchaser for value without notice.¹⁶⁵

3. Possession as inquiry notice¹⁶⁶

Prior to 1888 a purchaser of land in South Carolina was under a duty to investigate the possession thereof, and failing so to investigate, he would be charged with notice of any unrecorded interest which such investigation would have disclosed.¹⁶⁷ In that year a statute was enacted which provides that "[n]o possession of real property described in any instrument of writing required by law to be recorded shall operate as notice of such instrument. Actual notice shall be deemed and held sufficient to supply the place of registration only when such notice is of the instrument itself, or of its nature and

161. 4 AMERICAN LAW OF PROPERTY § 17.11 and cases cited therein at note 13.

162. 4 AMERICAN LAW OF PROPERTY § 17.11 at page 566. See *Hughson v. Mandeville*, 4 Des. Eq. 87 (S. C. 1810); *Black v. Childs*, 14 S. C. 312 (1880); *Martin v. Ragsdale*, 71 S. C. 67, 78, 50 S. E. 671 (1905).

163. See generally Annot., 59 A. L. R. 632 (1929); 4 AMERICAN LAW OF PROPERTY § 17.6; 5 TIFFANY, REAL PROPERTY § 1277 (3rd ed. 1939).

164. See *Aultman v. Utsey*, 34 S. C. 559, 13 S. E. 848 (1891).

165. *Southern Ry. v. Carroll*, 86 S. C. 56, 60, 67 S. E. 4, 138 Am. St. Rep. 1017 (1910) *semble*; *Martin v. Ragsdale*, 71 S. C. 67, 77, 50 S. E. 671 (1905) *semble*. In these cases the deeds which were held not to nullify the plea of bona fide purchase without notice actually were deeds without covenants of general warranty rather than true quitclaim deeds.

166. For a general discussion of this topic see Annot., 13 L. R. A. (N. S.) 49 (1908).

167. *Sheorn v. Robinson*, 22 S. C. 32 (1884); *Kairson v. Puckhaber*, 14 S. C. 626 (1880); *Adickes v. Lowry*, 15 S. C. 128 (1881), s. c. on a prior appeal, 12 S. C. 97 (1879); *Biemann v. White*, 23 S. C. 490 (1885); *Graham v. Nesmith*, 24 S. C. 285 (1886); *Sweatman v. Edmunds*, 28 S. C. 58, 5 S. E. 165 (1888); *Daniel v. Hester*, 29 S. C. 147, 7 S. E. 65 (1888). See *Ellis v. Young*, 31 S. C. 322, 325, 9 S. E. 955 (1889); *Tant v. Guess*, 37 S. C. 489, 500, 16 S. E. 472 (1892) (circuit court opinion).

purport."¹⁶⁸ The construction which has been placed upon the statute is that mere possession of land under an unrecorded instrument in writing required by law to be recorded is not sufficient notice of the interest created by such instrument.¹⁶⁹ Despite an unfortunate confusion of the issue in two recent cases¹⁷⁰ involving leaseholds, this construction of

168. 20 STAT. 15 (1888). The text as above given is that found in CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-109, and contains minor changes in language and punctuation.

169. *Foster v. Bailey*, 82 S. C. 378, 64 S. E. 423 (1909) (possession under unrecorded deed); *Richardson v. Ellis*, 112 S. C. 108, 98 S. E. 846 (1919) (possession under unrecorded deed); *Epps v. McCallum Realty Co.*, 139 S. C. 481, 138 S. E. 297 (1927) (possession under unrecorded contract of sale); *Van Ness v. Schachte*, 143 S. C. 429, 141 S. E. 721 (1928) (possession under unrecorded contract of sale). See *Savannah Timber Co. v. Deer Island Lumber Co.*, 258 Fed. 777 (E. D. S. C. 1918); *aff'd sub nom. Deer Island Lumber Co. v. Savannah Timber Co.*, 258 Fed. 785 (4th Cir. 1919). Of course, circumstances other than the possession of land by the claimant under an unrecorded instrument may be sufficient to charge a subsequent purchaser with notice of the outstanding interest. See *Oliver v. McWhirter*, 112 S. C. 555, 100 S. E. 533 (1919).

170. *Barksdale v. Hinson*, 212 S. C. 1, 46 S. E. 2d 170 (1948); *Adams v. Willis*, 225 S. C. 518, 83 S. E. 2d 171 (1954). In the *Barksdale* case a tenant in possession under a parol lease for one year was protected as against a subsequent purchaser of the premises without actual notice of the lease. Two opinions are reported. The rationale of the first opinion is that an oral lease not to exceed one year is not required to be recorded, the Landlord and Tenant Act of 1946 [44 STAT. 2584 (1946); CODE OF LAWS OF SOUTH CAROLINA, 1952 title 41] not having altered the prior law, and, therefore, a subsequent purchaser without notice takes subject to such lease. (In other words, at common law a prior legal interest prevails over a subsequent one, irrespective of the want of notice to the subsequent purchaser of the legal title. See page 350, *supra*.) The second opinion questions the rationale of the first opinion, and justifies the decision for the tenant solely on the ground that the subsequent purchaser would be charged with notice of the lease from the fact of the tenant's possession, and, therefore, that he could not qualify as a bona fide purchaser without notice. Since two of the justices concurred in the second opinion and only one in the first, the second is actually the opinion of the court.

The reasoning of the second opinion seems demonstrably erroneous. If the recording act does not require a lease for not to exceed one year to be recorded, the common law rule as to priorities is in effect, and the lessee as holder of a prior created legal interest will prevail over any subsequent purchaser, regardless of whether he purchased with or without notice of such prior legal interest. See p. 350, *supra*. On the other hand, if the recording act, construed in conjunction with the Landlord and Tenant Act of 1946, requires the recordation of a lease creating a term for not to exceed one year, very clearly the Act of 1888 [20 STAT. 15 (1888); CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-109] providing that possession under a written instrument required to be recorded is not notice to a subsequent purchaser is applicable. Thus it seems that the decision of the court properly may be justified only on the grounds adopted in the first opinion.

In *Adams v. Willis*, *supra*, a grantee of a lessor was held to take subject to an option to purchase the leased premises contained in a duly recorded lease. After assigning the proper reason for concluding that the grantee would be charged with notice of the lease, the court

the act seems settled, at least where the unrecorded instrument is one other than a lease.

4. Possession under a parol equity as notice

Does the Act of 1888¹⁷¹ apply where the claimant in possession is asserting an equitable interest not created by a written instrument? For example,¹⁷² suppose that A, having made partial payment of the purchase price, is in possession of Blackacre under an oral contract of sale. B, without actual knowledge of A's interest and without an investigation of the possession, then takes a conveyance for value from O, the record title holder. Will B be protected under the recording act as a purchaser for value without notice of A's interest? Prior to the Act of 1888 it is clear that B would be charged with notice from the fact of A's possession, regardless of whether or not B actually knew of such possession.¹⁷³ Since A's interest is not represented by "any instrument of writing required by law to be recorded,"¹⁷⁴ a literal reading of the act would seem to exclude B from the protection thereof, and, therefore, it would further seem that he will be charged with notice of A's interest by reason of the latter's possession. Several cases¹⁷⁵ subsequent to the act by way of dicta have stated that it has no application to an equitable interest not created by

added the dictum that the lessee's possession was sufficient to put the purchaser from the lessor on inquiry, citing the *Barksdale* case, *supra*, as authority. This dictum of the court would seem wholly to overlook the provisions of the Act of 1888.

171. 20 STAT. 15 (1888); CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-109.

172. Other examples would include claimants under constructive and resulting trusts, and donees claiming under parol gifts, and grantors in possession under absolute deeds intended as mortgages. See notes 69, 72, 73, and 76, *supra*.

173. See note 167, *supra*.

174. The text of the Act of 1888 is set out on p. 385, *supra*.

175. *Folk v. Brooks*, 91 S. C. 7, 9, 74 S. E. 46 (1912), wherein the court, per Mr. Justice Woods, said "[w]hen the contract for the purchase of the land is not written and therefore not an instrument required by law to be recorded this section has no application; and so we have the somewhat anomalous state of the law that possession of one who pays the purchase money and takes a formal deed conveying the land is no notice to subsequent purchasers or creditors of the claim of the person in possession, while the possession of one who pays the purchase money and enters under a mere parol contract for conveyance to him is notice of the equity of the party in possession." To the same effect is a statement in *Oliver v. McWhirter*, 112 S. C. 555, 563, 100 S. E. 533 (1919), and one in *Farr v. Sprouse*, 133 S. C. 93, 130 S. E. 210 (1925). See also the dissenting opinion of Mr. Justice Cothran in *Epps v. McCallum Realty Company*, 139 S. C. 481, 138 S. E. 297 (1927), discussed in note 176, *infra*. In *Manigault v. Lofton*, 78 S. C. 499, 59 S. E. 534 (1907), it was stated that the continued possession by a grantor in a

a written instrument. On the other hand, in a later case¹⁷⁶ it is declared, again by way of dictum, that under the Act of 1888 a parol equity has no superiority over an equity created by a written instrument, since the act by necessary implication is inclusive of parol equities. Therefore, until squarely decided by the court, whether or not since the Act of 1888 possession under a parol equity is constructive notice of such equity to a subsequent purchaser of the legal title is a question which must be regarded as an unanswered one.

Assuming that in South Carolina possession under a parol equity still constitutes notice despite the Act of 1888,¹⁷⁷ a number of questions relative to the necessary character of the possession which will operate as notice remain to be considered. Is human occupancy essential for the possession which serves as notice, or is such a possession sufficiently evidenced by other indicia of human activity on the land, such as the cultivation of crops, the cutting of timber, or the use of the land for pasturage?¹⁷⁸ Is a continuance in possession by a grantor after his conveyance of the land notice of a claim hostile to his grantee?¹⁷⁹ Is a joint possession by one claiming under a parol equity with another having a re-

deed given merely for security was notice of the grantor's interest, though the real basis of the decision seems to be actual knowledge by the subsequent purchaser of the grantor's interest.

176. *Epps v. McCallum Realty Co.*, 139 S. C. 481, 138 S. E. 297 (1927), wherein it was held that possession under a written but unrecorded contract of sale was not notice of the equity of the vendee in possession, since such a contract being required to be recorded, possession thereunder was not constructive notice because of the Act of 1888. Mr. Justice Cothran dissented on the ground that the then language of the recording act did not require the recordation of contracts of sale, and, therefore, the Act of 1888 was inapplicable. The court, per Mr. Justice Blease, refers to the statement by Mr. Justice Woods in *Folk v. Brooks*, 91 S. C. 7, 9, 74 S. E. 46 (1912), quoted in note 175, *supra*, as "unfortunate and wholly *obiter dicta*." Also criticized is *Oliver v. McWhirter*, note 175, *supra*, which is declared not to be authority for the doctrine that possession is notice of a parol equity in land. No mention is made of *Manigault v. Lofton*, note 175, *supra*, and *Farr v. Sprouse*, note 175, *supra*. But see the dissenting opinion of Mr. Justice Cothran in the *Epps* case, wherein he states that "[a] parol contract accompanied by possession would not come within the Act of 1888. . . ."

177. 20 STAT. 15 (1888); CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-109.

178. See 4 AMERICAN LAW OF PROPERTY § 17.15; 5 TIFFANY, REAL PROPERTY § 1288 (3rd ed. 1939).

179. See *Manigault v. Lofton*, 78 S. C. 499, 59 S. E. 534 (1907), discussed in note 175, *supra*; 4 AMERICAN LAW OF PROPERTY § 17.14; 5 TIFFANY, REAL PROPERTY § 1292 (3rd ed. 1939); Annot., 105 A. L. R. 845 (1936).

corded interest notice of the parcel equity?¹⁸⁰ Is the possession of a tenant notice not only of his own interest, but also of that of his lessor?¹⁸¹ These, as well as related questions, have been raised in other jurisdictions.¹⁸² Since not only is there no body of law on these matters in South Carolina, but also since the doctrine of possession as notice may have been wholly abrogated by the Act of 1888, no further treatment of these topics is made herein.

5. Physical condition of land as notice of the existence of easements¹⁸³

Unlike leasehold and freehold estates, which are corporeal interests, that is possessory, an easement is an incorporeal interest which does not confer a possessory right in land.¹⁸⁴ Therefore, the problem of the notice of an unrecorded easement afforded a subsequent purchaser from physical indicia on the land, while related to that of the notice of a corporeal interest afforded by a possession of the land, is not in all respects similar thereto.

Despite any doubt which may be entertained relative to whether or not the recording act is applicable to easements created by prescription or by implication,¹⁸⁵ it seems clear that an easement created by express grant must be recorded if it is to affect the rights of a subsequent grantee of the servient estate who purchases for value and without notice of the easement.¹⁸⁶

Suppose that an inspection of the land will disclose physical evidence of the existence of an unrecorded easement constituting a burden thereon. At common law it is generally held¹⁸⁷ that the presence on the land of physical indicia evidencing the existence of the easement is sufficient to charge the sub-

180. See *Ellis v. Young*, 31 S. C. 322, 9 S. E. 955 (1889); *Wagener & Co. v. Brown Bros.*, 82 S. C. 131, 62 S. E. 513, 63 S. E. 354 (1909). See 4 AMERICAN LAW OF PROPERTY § 17.13; 5 TIFFANY, REAL PROPERTY § 1290 (3rd ed. 1939); Annot., 2 A. L. R. 2d 854 (1948); Annot., 105 A. L. R. 845, 875 (1936); 13 L. R. A. (N. S.) 115-120 (1908).

181. See 4 AMERICAN LAW OF PROPERTY § 17.12; 5 TIFFANY, REAL PROPERTY § 1291 (3rd ed. 1939).

182. See 4 AMERICAN LAW OF PROPERTY §§ 17.12—17.15; 5 TIFFANY, REAL PROPERTY §§ 1287—1292 (3rd ed. 1939).

183. The following discussion likewise is applicable to the problem of constructive notice of profits *a prendre* from the physical condition of the servient land.

184. 3 POWELL, REAL PROPERTY § 404.

185. See p. 359, p. 361, *supra*.

186. See note 48, *supra*.

187. See Annot., 41 A. L. R. 1442 (1926), s. 74 A. L. R. 1250 (1931).

sequent purchaser with constructive notice similar to the notice of a possessory interest afforded by the possession of land. As regards rights of way for state highways the common law rule by statute¹⁸⁸ is confirmed in South Carolina, and the discussion which follows therefore can have no application to such rights of way.

In South Carolina the effect of the Act of 1888¹⁸⁹ on such constructive notice of an incorporeal interest is a query which must be considered. The text of the act speaks only of notice afforded by "possession of real property", and since an easement is not a possessory interest, it would seem that the common law rule as to notice of an easement from physical conditions on the land is not thereby altered. On the other hand, construing the act in view of its purpose to obviate the necessity of a physical inspection of the land and to permit a purchaser to rely upon the record, it would seem that it might be construed also to change the common law rule of constructive notice of the existence of an easement from physical conditions on the land. No case expressly passing on the question has been found, and several cases¹⁹⁰ since the Act of 1888 which touch on the matter are inconclusive. Therefore, until squarely decided by the court, whether or not the act has altered the prior existent law that physical evidence on the land affords constructive notice of an easement created by an unrecorded instrument is doubtful.

188. " . . . The location, construction or maintenance of any State highway shall constitute sufficient notice to put all persons . . . on inquiry as to the right of the State in and to the rights of way for such State highway." CODE OF LAWS OF SOUTH CAROLINA, 1952 § 33-145 [47 STAT. 457 (1951)]. An earlier enactment of a similar statute is in 36 STAT. 1238 (1930).

189. 20 STAT. 15 (1888); CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-109. The text of the act is set out on p. 385, *supra*.

190. *Harman v. Southern Railway Co.*, 72 S. C. 228, 51 S. E. 689 (1905); *Southern Railway Co. v. Howell*, 79 S. C. 281, 60 S. E. 677 (1908); *Beck v. Northwestern Railroad Co.*, 99 S. C. 310, 83 S. E. 335 (1914), 105 S. C. 319, 89 S. E. 1018 (1916); *Atlantic & C. Airline Railway Co. v. Limestone Globe Co.*, 109 S. C. 444, 96 S. E. 188 (1918). In these cases it was held that a subsequent purchaser of land had notice of an unrecorded railroad right of way across the land from the physical evidence of the maintenance and operation of the way. The opinion in none of these cases makes mention of the Act of 1888, though it appears that in one of them, *Southern Railway Co. v. Howell*, *supra*, counsel for the defendant subsequent purchaser argued to no avail that the act had abolished the doctrine of constructive notice from physical condition of the land. (See summary of appellant's brief in 79 S. C. at page 282.) It further should be noted that in the *Beck* case, *supra*, Justice Fraser dissented (99 S. C. at p. 318) on the ground that the Act of 1888 was controlling.

C. Record notice and chain of title

1. In general

As applied to land titles the term "record notice" (sometimes designated "constructive notice," or "constructive notice from the record") means that certain persons specified in the recording act will be charged with notice of the contents of the record, regardless of whether or not they actually have made an examination of the contents thereof. The South Carolina act¹⁹¹ charges with notice of the record subsequent creditors¹⁹² and purchasers (the term purchasers being inclusive of mortgagees¹⁹³); all others, it seems, are not so charged with record notice.¹⁹⁴ In the discussion which follows, refer-

However, in all of these cases the railway easements involved had been created prior to the Act of 1888, and, therefore, it may be argued that the law existent prior to the act was controlling. Thus in *Foster v. Bailey*, 82 S. C. 378, 381, 64 S. E. 423 (1909), wherein it was held that subsequent to the act possession under an unrecorded deed was not constructive notice of such deed, the court thus distinguished the railroad easement cases: "[t]he cases of *Harman v. Southern Railway*, [*supra*], and *Southern Railway v. Howell*, [*supra*], are not conclusive for appellant, as the possession under an unrecorded deed in each of those cases arose at a time when [the rule prior to the Act of 1888 was applicable], and was a continuing possession at the time the subsequent deed was made."

In *Haselden v. Schein*, 167 S. C. 534, 166 S. E. 634 (1932), an action to enjoin the defendant from obstructing a way across her land, the defendant asserted, among other defenses, that she had purchased without notice of the way. In affirming a judgment for the plaintiff, the court, after pointing out that defendant had record notice of the way, continued, "[m]oreover, the right of way was in open and notorious use; the slightest inquiry on the part of defendant would have apprised her of its nature, its extent, and that it was appurtenant to the property which she was buying and to which it was immediately adjacent." See also *Lane v. Bell Lumber Co.*, 122 S. C. 140, 149, 115 S. E. 207 (1922).

191. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-101.

192. Recording of a deed of land is notice to creditors of the grantor. *Executors of Lott v. De Graffenreid*, 10 Rich. Eq. 346 (S. C. 1858). However, such record is notice only of the deed's execution and contents, and not of the fact of fraud. *Godbold v. Lambert*, 8 Rich. Eq. 155 (S. C. 1856); *Means v. Feaster*, 4 S. C. 249 (1873).

193. See note 85, *supra*.

194. See general discussion of the nature of recording acts in *First Presbyterian Church of York v. York Depository*, 203 S. C. 410, 416 *et seq.*, 27 S. E. 2d 573 (1943). The record of a purported conveyance in fee simple of the demised land by the tenant is not record notice to the landlord. See *Trustees of Wadsworthville Poor School v. Jennings*, 40 S. C. 168, 18 S. E. 257, 891 (1893). But consider *Sudduth v. Sumeral*, 61 S. C. 276, 289, 39 S. E. 534, 85 Am. St. Rep. 883 (1901), to the effect that where a stranger goes into possession of land under a recorded deed from one tenant in common purporting to convey the entire fee in the land, "this is notice to the world that he is claiming the entire and exclusive interest in the land, and his possession may be adverse to all the world from the time of its commencement." See *Knotts v. Joiner*, 217 S. C. 99, 103, 59 S. E. 2d 850 (1950). For cases

ence is made only to subsequent purchasers, but it is intended that such discussion be equally applied to the other persons afforded notice by the South Carolina statute. In order for the

from other jurisdictions to the same effect, see 4 TIFFANY, REAL PROPERTY § 1185 note 73 (3rd ed. 1939). Mr. Tiffany suggests that "[t]his rule may be based upon the change of possession, and not upon the effect of a recording statute, or the record of a conveyance thereunder. . . ." 4 TIFFANY, *op. cit. supra* p. 533. For an analysis of other problems relative to the notice afforded one cotenant by the record of conveyances to or from another cotenant, see 4 TIFFANY, *op. cit. supra* pp. 532-535. See also Annot., 27 A. L. R. 8, 10, 23, 24 (1923), s. 71 A. L. R. 444 (1931).

The record of a deed by a mortgagor conveying a portion of the mortgaged land is not sufficient to put the mortgagee on notice of the grantee's right to have the land retained by the mortgagor first subjected to the lien of the mortgage. See *Lake v. Shumate*, 20 S. C. 23 (1883); Annot., 110 A. L. R. 65, 71 (1937), and the cases there cited. However, the record of a conveyance of a portion of the mortgaged land is notice to subsequent purchasers of other portions, of the equity in favor of the first purchaser to have later purchased portions first sold for payment of the mortgage debt. See Annot., 131 A. L. R. 4, 100 (1941), and the cases there cited.

A person advancing money to discharge a prior first mortgage and taking a new mortgage as security is entitled to subrogation to the lien of such first mortgage in order to afford him priority over a recorded second mortgage of which he has no actual notice. *Enterprise Bank v. Federal Land Bank*, 139 S. C. 397, 138 S. E. 146 (1927). See *James v. Martin*, 150 S. C. 75, 147 S. E. 752 (1929); Annot., 70 A. L. R. 1396, 1398 (1931).

The cases are discordant on the question of whether or not the record of a junior mortgage is constructive notice to the mortgagee of a senior mortgage for advances so as to postpone to the lien of the junior mortgage optional advances thereafter made by the senior mortgagee. The weight of authority is said to be that actual notice to the senior mortgagee is necessary thus to postpone the lien of his mortgage, but a minority view is that the record of the junior mortgage operates as constructive notice to him. See OSBORNE, MORTGAGES, § 293; JONES, MORTGAGES, § 372 (7th ed. 1915).

The limited South Carolina authority on the point is conflicting. In *Lake v. Shumate*, 20 S. C. 23 (1883), the court in effect adopted the majority view. However, in the later case of *Norwood v. Norwood*, 36 S. C. 331, 15 S. E. 382 (1892) the court favored the minority view, stating (36 S. C. at page 343), "So far as any advances made to [the mortgagor] by [the senior mortgagees] after [recording of junior mortgage], they were made at their peril, for the registry laws of this State made the record of [the junior mortgage] on that day notice, so that it was impossible for [senior mortgagees] to avail themselves of the doctrine of purchasers for a valuable consideration, or subsequent creditors without notice. For this court to hold otherwise would be to nullify the registry laws of this state." No supporting authority is cited in the *Norwood* case, nor is the *Shumate* case mentioned. A dictum in a subsequent case, *Ex parte American Fertilizing Co.*, 122 S. C. 171, 176, 115 S. E. 236 (1922), accords with the *Norwood* case and cites it as authority on the point.

Since enactment of the statute (CODE OF LAWS OF SOUTH CAROLINA, 1952 § 45-55) according priority to a mortgage for advances even as to optional advances made after notice of a subsequent mortgage, the question in South Carolina of the effect of recordation of a junior mortgage on optional advances thereafter made under a senior mortgage would seem to be academic. For a discussion of the statute, see page 371, *supra*.

record of an instrument affecting the title to land to operate as constructive notice to subsequent purchasers, such recordation must be pursuant to statutory authorization.¹⁹⁵ Thus the record of an instrument whose recordation is not authorized by law will not operate as constructive notice.¹⁹⁶ Likewise, no constructive notice is afforded by the record of an instrument not entitled to record because of failure to comply with the prerequisites of the recording statutes,¹⁹⁷ nor by the record of an instrument invalid because of defective execution.¹⁹⁸

Moreover, even though properly recorded pursuant to statutory authorization, the record of the instrument is constructive notice only if it is in the subsequent purchaser's "chain of title",¹⁹⁹ which is merely another way of saying that it constitutes one of the records which the subsequent purchaser is charged with the duty of searching. Accordingly, consideration must be given to the problem of what records are considered to be in the chain of title of a subsequent purchaser.

195. See generally 4 AMERICAN LAW OF PROPERTY § 17.17; 5 TIFFANY, REAL PROPERTY § 1264 (3rd ed. 1939).

196. See Villard v. Robert, 1 Strob. Eq. 393, 400 (S. C. 1847); Brown v. Wood, 6 Rich. Eq. 155, 174 (S. C. 1853); Bossard v. White, 9 Rich. Eq. 483, 496 (S. C. 1857); Lynch v. Hancock, 14 S. C. 66, 89 (1880); Williams & Co. v. Paysinger, 15 S. C. 171, 174 (1881); Arthur v. Screven, 39 S. C. 77, 80, 17 S. E. 640 (1893); Singleton v. Singleton, 60 S. C. 216, 235, 38 S. E. 462 (1901); Epps v. McCallum Realty Co., 139 S. C. 481, 502, 138 S. E. 297 (1927). See Annot., Ann. Cas. 1913B 1070, 1071; Annot., 3 A. L. R. 2d 577 (1949); 4 AMERICAN LAW OF PROPERTY § 17.17, note 9.

197. *In re Rosenthal*, 238 Fed. 597 (S. D. Ga. 1916) (Assignment of bond for title not probated), *aff'd sub nom.* Georgia Railroad Bank v. Koppel, 246 Fed. 390 (5th Cir. 1917); Woolfolk v. Graniteville Mfg. Co., 22 S. C. 332 (1885) (record of a deed showing on its face that it was improperly probated before an out of state magistrate); Wood v. Reeves, 23 S. C. 382 (1885) (record of an unprobated mortgage); Watts v. Whetstone, 79 S. C. 357, 60 S. E. 703 (1908) (record of deed showing on its face that it was improperly probated before the grantor as notary public); Seale Motor Co., Inc. v. Stone, 218 S. C. 373, 62 S. E. 2d 824 (1950) (record of a chattel mortgage showing on its face a defective acknowledgment). See Beck v. Northwestern Railroad Co., 99 S. C. 310, 83 S. E. 335 (1913), 105 S. C. 319, 89 S. E. 1018 (1916) (deed not probated). Annot., 19 A. L. R. 1074 (1922), s. 72 A. L. R. 1039 (1931). See pages 407-411, *infra*, for a discussion of what is a sufficient compliance with the prerequisites of recordation.

198. Harper v. Barsh, 10 Rich. Eq. 149 (S. C. 1858) (mortgage with only one witness); Mowry v. Crocker, 33 S. C. 436, 12 S. E. 3 (1890) ("an informal and defective paper, which at most amounts only to an equitable mortgage, and which was improperly recorded"); Arthur v. Screven, 39 S. C. 77, 17 S. E. 640 (1893) (mortgage without a seal). *Cf.* McPherson v. McPherson, 21 S. C. 261 (1884) (record erroneously omitting seal from a deed). See cases in 4 AMERICAN LAW OF PROPERTY § 17.17 note 8.

199. See generally 4 AMERICAN LAW OF PROPERTY §§ 17.17-17.26; 5 TIFFANY, REAL PROPERTY §§ 1265-1274 (3rd ed. 1939).

What recorded instruments are considered to be in the chain of title of a subsequent purchaser can best be illustrated and discussed by reference to a hypothetical chain of title. Suppose that in 1955 A is purchasing Blackacre from the record title holder, B. Suppose further that an examination of the grantee indices discloses that B acquired title from C by deed dated and recorded in 1945; that C acquired title from D by deed dated and recorded in 1940; that D acquired title from E in 1931, and so on. Examining title for A, it is obvious that the grantor index books must be checked in the name of B for the years 1945 to date, in the name of C for the years 1940 through 1945, in the name of D for the years 1931 through 1940, and so on, the precise limits of search as to each party being from the day before the date of the deed into him, to the day after the record of the deed out of him.²⁰⁰

2. Recorded conveyance from owner whose deed is unrecorded

Suppose that in 1950 B had conveyed Blackacre to X by a deed X failed to record, and that in 1953 X conveyed to Y, who duly recorded his deed. Is the record of the deed from X to Y within the chain of title which A, a subsequent purchaser from B, is charged with the duty of examining? It is generally held that such a conveyance, either by way of deed or mortgage, is not within the chain of title of a subsequent purchaser from B since no reasonable search of the record will disclose its existence.²⁰¹ In South Carolina it seems that the record of such a deed is not within B's chain of title so as to charge A with constructive notice thereof.²⁰² However,

200. See 3 WEED, NEW YORK LAW OF REAL PROPERTY 1358 (3rd ed. 1938), quoted in note 210, *infra*. Search for the full calendar day is only out of abundance of precaution, however, since in determining priority of record, fractions of a day are considered. *Callahan v. Hallowell*, 2 Bay 8 (S. C. 1796) (writs of attachment); *Ex parte Stagg*, 1 Nott & McC. 405 (S. C. 1819) (real estate mortgage and judgment); *Carroll v. Cash Mills*, 125 S. C. 332, 118 S. E. 290 (1923) (title retention contract and order appointing a receiver); *South Carolina National Bank v. Guest*, ____ S. C. ____, 102 S. E. 2d 215 (1958) (chattel mortgages).

In *James v. Martin*, 150 S. C. 75, 147 S. E. 752 (1929), a money judgment was obtained against a grantor of land subsequent to the conveyance by him. Thereafter the grantee mortgaged the land. In a contest between the judgment creditor and the mortgagee the latter was held not to have constructive notice of the judgment.

201. 4 AMERICAN LAW OF PROPERTY § 17.17; 5 TIFFANY, REAL PROPERTY § 1265 (3rd ed. 1939).

202. See *Smyly v. Colleton Cypress Co.*, 95 S. C. 347, 78 S. E. 1026 (1913). But see *VanDivierv v. Mitchell*, 45 S. C. 127, 22 S. E. 759 (1895). *Levi v. Gardner*, 53 S. C. 24, 30 S. E. 617 (1898), would seem

where the recorded conveyance from X to Y was a mortgage rather than a deed, the South Carolina court in the case of *VanDiviere v. Mitchell*²⁰³ held that A took subject thereto despite the fact that B's deed to X was unrecorded, on the theory that the sole duty imposed upon the mortgagee by the recording act is the recordation of his mortgage. In view of the realities of title examination the holding in the *VanDiviere* case seems indefensible. However, while a later case²⁰⁴ has thrown doubt upon its present day authority, until expressly overruled by decision or statute the holding remains a potential trap in the path of the hapless purchaser or mortgagee of real property.

3. Conveyance prior to grantor's acquisition of title

Is a subsequent purchaser of land charged with notice by the record of a conveyance executed by a person in his grantor's chain of title prior to such person's acquisition of title? For example, assume that in 1955, A, a purchaser for value, is conveyed land by B, who acquired title from C by a deed executed and recorded in 1950. Assume further that prior to his acquisition of title in 1950, B in 1949 executed a general warranty deed purporting to convey the premises to X, who promptly recorded. In South Carolina the law is clear that as between B and X, B will be estopped to assert

not in conflict with the correct rule. In that case land had been sold at execution sale on a judgment against the owner of record. Although the purchase price was paid, the purchaser at the sale acquired only an equitable interest since he did not obtain a deed. Thereafter the purchaser conveyed his equitable interest by a deed which was recorded. In a contest between persons claiming through the grantee from the purchaser at the execution sale and a subsequent purchaser of the legal title from the judgment debtor, the court held that the subsequent purchaser was charged with notice of the contents of a recorded conveyance made by the grantee from the purchaser at the execution sale. The holding would seem explainable on the ground that the judgment against the record owner being in the chain of title of the subsequent purchaser [see *Hardin v. Clark*, 32 S. C. 480, 11 S. E. 304 (1890)], examination of the judgment roll would have disclosed the outstanding equity of the purchaser at execution sale, in which event further search of the record would have disclosed the deed in question.

203. 45 S. C. 127, 22 S. E. 759 (1895). See *Younts v. Starnes*, 42 S. C. 22, 19 S. E. 1011 (1894). It seems clear that a proper construction of the 1958 amendment to the South Carolina recording statute does not necessitate continued adherence to the holding in the *Van Diviere* case. For text of the amendment see page 375, *supra*. See also note 118d, *supra*.

204. *Enterprise Bank v. Federal Land Bank*, 139 S. C. 397, 402, 138 S. E. 146 (1927).

his after-acquired title against X, his prior grantee.²⁰⁵ However, as against A, a purchaser for value without actual notice of the deed from B to X, no such estoppel will arise. The record of the deed from B to X is without the chain of title which a purchaser from B is bound to search, and, therefore, such record is not constructive notice to A.²⁰⁶

4. Conveyance executed before but recorded after a subsequent conveyance by grantor

Suppose A, the record owner, conveys to B, but before B records A makes a second conveyance to C, who has actual notice of the prior conveyance²⁰⁷ to B. C records, then B records; thereafter C conveys to D, a purchaser for value without actual notice of the deed from A to B. Who is entitled as between B and D? If the contest were between B and C it is clear that B would prevail despite his failure to record before the subsequent conveyance to C, since C's actual knowledge would deprive him of the protection of the recording act.²⁰⁸ However, as a purchaser for value without actual notice from a grantee with notice, D is entitled to the protection of the act,²⁰⁹ unless the record of the deed to B is within the

205. The many South Carolina cases include *Reeder* ads. *Craig*, 3 McC. 411 (S. C. 1826); *Robertson v. Sharpton*, 17 S. C. 592 (1882); *Gaffney v. Peeler*, 21 S. C. 55 (1884); *Yawkey v. Lowndes*, 150 S. C. 493, 148 S. E. 554 (1929); *Hungerpillar v. Keller*, 192 S. C. 329, 6 S. E. 2d 741 (1940). See Annot., 58 A. L. R. 345 (1929), s. 144 A. L. R. 554 (1943). Some cases have held the grantor to be estopped by a deed without covenants of warranty, where the deed purports to convey a certain estate. 3 AMERICAN LAW OF PROPERTY § 15.19; 4 TIFFANY, REAL PROPERTY § 1232 (3rd ed. 1939). See *Reeder* ads. *Craig*, *supra*; *Harvin v. Hodge*, Dud. 23 (S. C. 1837); and *Exrs. of Lamar v. Simpson*, 1 Rich. Eq. 71 (S. C. 1844), making no mention of any requirement of covenants of warranty. An estoppel of B to assert an after-acquired title likewise would have resulted if the deed from B to X had purported to convey an expectancy. *Blackwell v. Harrelson*, 99 S. C. 264, 84 S. E. 233 (1914); *Wallace v. Quick*, 156 S. C. 248, 153 S. E. 168 (1930). 3 AMERICAN LAW OF PROPERTY §§ 15.19, 15.20.

206. *Richardson v. Atlantic Coast Lumber Corp.*, 93 S. C. 254, 75 S. E. 371, L. R. A. 1918C 788 (1912); *Blackwell v. Harrelson*, 99 S. C. 264, 84 S. E. 233 (1914). See Annot., 25 A. L. R. 81 (1923). 3 AMERICAN LAW OF PROPERTY § 15.22; 4 AMERICAN LAW OF PROPERTY § 17.20; 4 TIFFANY, REAL PROPERTY § 1234 (3rd ed. 1939). It is unlikely that the 1958 amendment to the South Carolina recording statute will be held to alter the result of the cited South Carolina cases. For text of the amendment see page 375, *supra*. See also note 118d, *supra*.

207. This prior conveyance may be a mortgage or a grant of an easement rather than a conveyance in fee simple.

208. See page 384, *supra*.

209. See page 406, *infra*. However, if the applicable recording statute requires priority of recording as well as purchase without notice (see text of the 1958 amendment to the South Carolina recording statute at page 375, *supra*), it is arguable that D necessarily loses in this situation. For a discussion of this problem see note 118d, *supra*.

chain of title so as to constitute constructive notice to D. Should the record of an instrument not recorded until after the executing party on the record has parted with his interest in the property constitute constructive notice; in other words, must the title examiner search the indices and records not only for the period of record ownership by each of the successive owners, but also up to the time of present search as to each prior owner in the chain? When considered in view of the realities of title examination the obvious answer to our hypothetical case would seem to be that the recording of the deed to B is without the chain of title, and, therefore, that D prevails over B.²¹⁰ No South Carolina case considering the problem has been found, and the cases from other jurisdictions are divided,²¹¹ with a majority favoring B. Until the question is settled, therefore, the South Carolina title examiner must reckon with the possibility that ceasing his search of the records as to a prior owner in the chain of title as of the date when such owner by a recorded instrument has parted with title, rather than continuing his search as to each prior owner until the closing date of the examination, may be an unwarranted short cut which can result in a loss to his client.

5. Recorded conveyance from owner of a parcel equity as notice

Suppose that O, owner of Blackacre, conveys the same to A, who goes into possession, by a recorded deed in form an

210. "The principle of these cases [holding that B prevails over D] is absurd, because it would necessitate a search to date against every name in the chain of title. This is never done. Search is only made against each name, from the day before the date of the deed into him, to the day after the record of the deed out of him." 3 WEED, NEW YORK LAW OF REAL PROPERTY 1358 (3rd ed. 1938), as quoted in Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. PA. L. REV. 391, 415 (1945). Professor Philbrick then comments: "As already said this is believed to be true throughout the United States. A legal construction of the recording acts that is utterly inconsistent with the practice of title examiners is, literally, nothing but a snare for the intending purchaser who is the intended favorite of those statutes." Philbrick, *op. cit.*, 415.

211. Among the cases holding for B are *Bayles v. Young*, 51 Ill. 127 (1869); *English v. Waples*, 13 Iowa 57 (1862); *Woods v. Garnett*, 72 Miss. 78, 16 So. 390 (1894); *Ryle v. Davidson*, 116 S. W. 823 (Tex. Civ. App. 1908). Among the cases in favor of D are *Morse v. Curtis*, 140 Mass. 112, 2 N. E. 929 (1885); *Bowman v. Holland*, 116 Va. 805, 83 S. E. 393 (1914).

The definitive treatment of the problem is that of Professor Philbrick in Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. PA. L. REV. 125, 259, 391-440 (1944-45), wherein the text and case authorities are collated and subjected to detailed analysis. Brief discussions are

absolute conveyance, but which is intended only as a mortgage.²¹² Thereafter O mortgages his retained equitable interest to B, who records. C, without actual notice of the interest of O and B, then takes a mortgage or a conveyance for value from A, the legal title holder of record. In such a case it seems that C would prevail as a bona fide purchaser for value of the legal title without notice of the equities of O and B, despite the fact that B's mortgage had been recorded. The same considerations²¹³ which should be regarded as controlling in the case of a conveyance executed before but recorded after a subsequent conveyance by a grantor would seem equally applicable to the present situation. Therefore, the record of the mortgage by O should not be considered within the chain of title C is required to search. No South Carolina case²¹⁴ expressly deciding the point has been found.

6. Imposition of restrictive covenants upon retained land in conveyances of other land²¹⁵

Suppose that O, in a deed conveying lot one to A, imposes restrictive covenants²¹⁶ on lot two, retained by O. Does B, who subsequently purchases lot two from O without actual

found in 4 AMERICAN LAW OF PROPERTY § 17.22; 5 TIFFANY, REAL PROPERTY § 1269 (3rd ed. 1939).

212. See text supported by note 76, *supra*.

213. See page 397, *supra*.

214. In *Lake v. Shumate*, 20 S. C. 23 (1883), a deed in form an absolute conveyance was treated by the court as a mortgage. Subsequent to this deed the mortgagor mortgaged his equitable interest to a second mortgagee, who duly recorded. The first mortgagee, without actual notice of the second mortgage, thereafter made advances in reliance on her security interest in the mortgaged land. In a contest between first and second mortgagees it was held that the record of the second mortgage was not notice thereof to the first mortgagee. However, consider *Norwood v. Norwood*, 36 S. C. 331, 15 S. E. 382 (1892), and *Ex parte American Fertilizing Co.*, 122 S. C. 171, 115 S. E. 236 (1922), discussed in note 194, *supra*.

215. See generally 4 AMERICAN LAW OF PROPERTY § 17.24; OSBORNE, MORTGAGES 504; 5 TIFFANY, REAL PROPERTY § 1266 (3rd ed. 1939); Annot., 16 A. L. R. 1013 (1922).

216. Where the burden imposed upon retained land is an easement rather than a restrictive covenant it seems more uniformly to be held that a subsequent purchaser of the retained land takes subject thereto. The reason for the different treatment afforded easements and restrictive covenants by some courts is thus explained in *Glorieux v. Lighthipe*, 88 N. J. L. 199, 96 Atl. 94, Ann. Cas. 1917E 484 (1915): "The case differs from the conveyance of an easement or any interest that lies in grant. A grant takes effect regardless of notice; an equitable servitude is the creature of equity alone and depends entirely on the existence of notice." However, see 4 AMERICAN LAW OF PROPERTY § 17.24 and Annot., 16 A. L. R. 1013 (1922) to the effect that some courts hold the subsequent purchaser of retained land to take free both of the burden of easements and restrictive covenants.

notice of the burden of the restrictive covenants, take subject thereto by reason of any constructive notice afforded him by the recording of the deed to A? Stated another way, are conveyances of other lots by O, the common grantor, within the chain of title of B, a subsequent purchaser of land retained by the common grantor, so that a title examiner for B must not only examine prior conveyances by O to insure that no double conveyance of lot two has been made, but also to insure that no restrictive covenants have been imposed thereon as incident to the conveyance of some other lot?

On this question the authorities are divided, with some holding B to have constructive notice of the imposition of the restrictive covenants,²¹⁷ while others hold that the record of the deed to A is not within B's chain of title, and, therefore, is not constructive notice to B.²¹⁸ Since the question apparently has not been settled in South Carolina,²¹⁹ title examiners would be well advised to proceed on the theory that prior conveyances of other lots by the common grantor may be within the chain of title for the purpose of affording constructive notice of restrictive covenants imposed by such conveyances upon retained lots.

7. Recitals in recorded instruments

A purchaser is charged with notice not only of all recorded instruments within his chain of title, but also with notice of unrecorded instruments affecting the title which are referred to in the recorded instruments within his chain.²²⁰

217. Selected cases include *Lowes v. Carter*, 124 Md. 678, 93 Atl. 216 (1915); *McQuade v. Wilcox*, 215 Mich. 302, 183 N. W. 771, 16 A. L. R. 997 (1921); *Finley v. Glenn*, 303 Pa. 131, 154 Atl. 299 (1931). For additional cases see Annot., 16 A. L. R. 1013 (1922); 4 AMERICAN LAW OF PROPERTY § 17.24, note 2.

218. Selected cases include *Hancock v. Gumm*, 151 Ga. 667, 107 S. E. 872, 16 A. L. R. 1003 (1921); *Glorieux v. Lighthipe*, 88 N. J. L. 199, 96 Atl. 94, Ann. Cas. 1917E 484 (1915) and Annot.; *Buffalo Academy v. Boehm Bros.*, 267 N. Y. 242, 196 N. E. 42 (1935). For additional cases see 4 AMERICAN LAW OF PROPERTY § 17.24, note 1.

219. In *McDonald v. Welborn*, 220 S. C. 10, 66 S. E. 2d 327 (1951), a suit to enjoin the violation of restrictive covenants within a subdivision, the court, in considering the question of notice of the covenants to the defendants, said (220 S. C. at p. 15), "Defendants overlook that this instrument was incorporated by direct reference to book and page of its recordation, *not only in the deed by Greene to the defendants, but in the deeds of all of the purchasers of the 75 lots sold by Willis, the original owner and grantor*" (italics added). The italicized language may mean the court took the view that conveyances of other lots by the common grantor are within the chain of title of a subsequent purchaser of another lot. Even if such interpretation is correct, however, the statement is obviously a dictum.

220. *Moyle v. Campbell*, 126 S. C. 180, 119 S. E. 186 (1923); *Kirton*

8. Variance of name in successive records²²¹

In a South Carolina case²²² the evidence established that an owner of a chattel was known in the community both as R. C. McKenzie and as W. A. McKenzie. In a contest between successive mortgagees of the chattel the court held that the record of the chattel mortgage executed in the name of R. C. McKenzie constituted record notice to the subsequent mortgagee taking a mortgage under the name W. A. McKenzie. The extent to which the court will apply the same reasoning in the real property field remains to be determined.²²³ However, where title to land is involved it would

v. Howard, 137 S. C. 11, 134 S. E. 859 (1926); National Bank of Newberry v. Livingston, 155 S. C. 264, 152 S. E. 410 (1930); Young v. Pitts, 155 S. C. 414, 152 S. E. 640 (1930); McDonald v. Welborn, 220 S. C. 10, 66 S. E. 2d 327 (1951). PATTON, TITLES § 348. However, it seems that a purchaser is not charged with notice of recitals in satisfied mortgages of record. See National Bank of Newberry v. Livingston, 155 S. C. 264, 282, 152 S. E. 410 (1930).

In *Hardin v. Clark*, 32 S. C. 480, 11 S. E. 304 (1890), it was said that since a purchaser of land was charged with constructive notice of the lien of an unsatisfied money judgment against a former owner, he also was charged with notice of certain facts which inquiry concerning the judgment would have disclosed. The statement is questionable.

In *Green v. Maddox*, 97 Ark. 397, 134 S. W. 931 (1911), it further was held that even though an unrecorded instrument is not referred to in any instrument of record, yet if a purchaser must derive his title through such instrument he will be charged with notice thereof. The court said (134 S. W. at p. 933): "Every purchaser who holds under a conveyance through which he must trace his title is bound by whatever is contained in it. It is his imperative duty to obtain and examine all the instruments which constitute essential links in his chain of title, and he is conclusively presumed to know all the recitals and matters contained therein affecting the title or the estate whether they are recorded or not." To the same effect is *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241 (1884). See *McDonald v. Welborn*, *supra*, 220 S. C. 10, 16. See 2 DEVLIN, DEEDS § 1001; OSBORNE, MORTGAGES 525. *But cf.* *Southern Ry. v. Carroll*, 86 S. C. 56, 67 S. E. 4, 138 Am. St. Rep. 1017 (1910), holding that a purchaser from a life tenant in possession for more than twenty years under an unrecorded deed would be protected as a bona fide purchaser if he had no actual notice of his grantor's limited estate. However, see *Davis v. Sellers*, 229 S. C. 81, 91 S. E. 2d 885 (1956), which on this point seems irreconcilable with *Southern Ry. v. Carroll*.

221. See generally 1 PATTON, TITLES §§ 72-79 (2nd ed. 1957).

222. *Brayton v. Beall*, 73 S. C. 308, 53 S. E. 641 (1906). *Cf.* *Hauser v. Callaway*, 36 F. 2d 667 (8th Cir. 1929), holding the record of a chattel mortgage executed in the name of Chester C. Callaway to be constructive notice of a mortgage by Charles Chester Callaway.

223. Indicative of the fact that the same rule might be applied to land is the court's discussion in the *Brayton* case, note 222, *supra*, of *Fallon v. Kehoe*, 38 Cal. 44, 99 Am. Dec. 347 (1869). In the *Brayton* case the South Carolina court thus summarizes the facts and holding of the California court in the *Fallon* case: "... a lot was granted to an individual in the name of Darby O'Fallon, a nickname by which he was generally or often called and known, although his real name was Jeremiah Fallon. By his true name Jeremiah Fallon conveyed to the plaintiff and the deed was duly recorded. Subsequently Fallon executed a deed to the

seem that an entry in the record in a name other than that in which title to the land was acquired should not constitute record notice unless the entry in the other name is sufficient to lead a reasonably careful searcher of the record to make such inquiry as would disclose the true facts.²²⁴ To hold otherwise would seem unnecessarily to impair the functioning of the recording system.

9. Mortgage recorded in deed book as record notice

The South Carolina court has held that recordation in the deed book of a mortgage in form an absolute conveyance affords record notice of the existence of the mortgage,²²⁵ the South Carolina statute²²⁶ not requiring that deeds and mortgages of real estate be recorded in separate books.

10. Chattel mortgage on fixtures as notice to purchaser of realty²²⁷

In *Liddell Co. v. Cork*,²²⁸ the facts were that a farm owner had installed on his farm certain machinery consisting of engines, boilers, sawmill and a cotton ginning outfit, purchased by him on conditional sale agreements recorded only in the chattel mortgage book. In a contest between the conditional vendor of the machinery and a subsequent purchaser of the farm without actual notice of the former's interest, the conditional vendor was held to have priority. This was on the theory that despite the fact that the machines had be-

premises in the name of Darby O'Fallon to Teal, who conveyed to Divine, who conveyed to defendant, Kehoe, a purchaser for valuable consideration and without notice. Under these facts the court held that the record of the conveyance by Jeremiah Fallon was constructive notice to a subsequent purchaser, although she took deed in good faith, tracing her title to the name on record by which it was acquired, without notice from the record or otherwise that Darby O'Fallon and Jeremiah Fallon were names of the same person."

224. Compare text and cited cases at the text supported by note 233, *infra*.

225. *Cox v. Enterprise Bank*, 115 S. C. 191, 104 S. E. 693 (1920).

226. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-57.

227. See generally 4 AMERICAN LAW OF PROPERTY § 18.14; 1 PATTON, TITLES § 43 pp. 43-47 (2d ed. 1957); BROWN, PERSONAL PROPERTY 802 (2d ed. 1955); Annot., 13 A. L. R. 448, 484 (1921), s. 73 A. L. R. 748, 773 (1931). The majority rule is that the record of a chattel mortgage or conditional sale agreement is not constructive notice to a subsequent purchaser of realty. See authorities cited above. Both the UNIFORM CONDITIONAL SALES ACT and the UNIFORM COMMERCIAL CODE (neither of which is law in South Carolina) provide for the recording of conditional sales of chattels made fixtures to land in the office where land titles are recorded. See BROWN, PERSONAL PROPERTY 802 *et seq.* (2d ed. 1955).

228. 120 S. C. 481, 113 S. E. 327, 23 A. L. R. 800 (1922).

come fixtures, the recorded conditional sale agreements nevertheless constituted constructive notice to the subsequent purchaser of the realty. Whether or not the same principle is applicable in situations involving such fixtures as furnaces, water heaters, etc., installed in dwellings, is open to question. Such equipment also is frequently sold on conditional sale agreements, and it may be that a purchaser of residential realty in like manner is charged with notice of any such agreements recorded in the chattel mortgage book.²²⁹

11. Failure to index and misindexing

In several South Carolina cases²³⁰ it has been held that the record of an instrument is constructive notice despite the fact that the instrument has not been entered on the index. Since these decisions, the recording statute has been altered by an amendment providing in part that "... the recordation of a deed, mortgage or other written instrument shall not be notice as to the purport and effect thereof, unless the filing of the same for record be entered as required hereby in the indexes."²³¹ While no cases deciding the point have been

229. In *Liddell Co. v. Cork*, note 228, *supra*, the court said (120 S. C. at page 488): "Granting that the record of an instrument is notice only to those who are bound to search for it . . . it does not follow that the purchaser of real estate fixtures — property which was once personalty and which may again become personalty by severance — is under no obligation to examine the public records for incumbrances which the owner of the fixtures may have placed thereon before annexation to the real estate."

"It is a matter of common knowledge that sawmills, ginning outfits, and similar machinery are frequently, if not generally, sold on time and under agreements reserving title in the seller until paid for. The presence of such fixtures in quantity should put a prospective purchaser of the land upon inquiry as to their history. Instruments covering property of that character, even if separately recorded pursuant to the express provisions of the statute in the chattel mortgage book, cannot be said to be instruments which are not in the line of the title of the real estate to which such property may be annexed as fixtures."

230. *Armstrong v. Austin*, 45 S. C. 69, 22 S. E. 763, 29 L. R. A. 722 (1895) (mortgage); *Greenwood Loan & Guarantee Assn. v. Childs*, 67 S. C. 251, 45 S. E. 167 (1903) (deed); *Mitchell v. Cleveland*, 76 S. C. 432, 57 S. E. 33 (1907) (deed). See *Fretwell v. Pearman*, 134 S. C. 545, 549, 133 S. E. 433 (1926).

231. 34 STAT. 85 (1925). The full text as contained in CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-156 reads as follows: "The register of mesne conveyances or clerk of court in those counties where the office of the register of mesne conveyances has been abolished shall immediately upon the filing for record of any deed, mortgage or other written instrument of the character mentioned in § 60-101 enter it upon the proper indexes in his office, which shall constitute an integral, necessary and inseparable part of the recordation of such deed, mortgage or other written instrument for any and all purposes whatsoever and this shall likewise apply to any copy of the indexes made subsequently by the register of mesne conveyances or clerk of court or the deputy of either thereof

found,²³² it would seem unquestionable that unless a deed recorded since the passage of the amendment has been indexed its record will not afford constructive notice.

It further appears that since the sole purpose of an entry on the index is to disclose the existence of an instrument to one making a search of the records therefor, if the entry as made does not reasonably disclose the instrument's existence, such entry does not constitute a sufficient compliance with the 1925 amendment, and, therefore, the record of the instrument will not constitute constructive notice. While no South Carolina cases have been found, in other states making the index an essential part of the record it has been held that an entry on the index which fails reasonably to disclose the existence of the recorded instrument prevents the record from constituting constructive notice to subsequent purchasers.²³³

12. Failure to record and errors in the record

In South Carolina the mere filing for record of an instrument does not afford constructive notice; until the instrument is actually recorded no constructive notice is given to persons subsequently dealing with the property.²³⁴ Furthermore, if

or by his authority for the purpose of replacing the original indexes. The entries in the indexes hereby required to be made shall be notice to all persons sufficient to put them upon inquiry as to the purport and effect of the deed, mortgage or other written instrument so filed for record, but the recordation of a deed, mortgage or other written instrument shall not be notice as to the purport and effect thereof unless the filing of the instrument for record be entered as required hereby in the indexes."

232. In *Fretwell v. Pearman*, 134 S. C. 545, 133 S. E. 433 (1926), a suit arising under the law as it existed prior to the 1925 amendment against a former clerk of court and his bondsman to recoup a loss to the plaintiff which resulted from the clerk's failure to index a recorded mortgage, Justice Cothran in his dissent, after citing the South Carolina cases to the effect that failure to index does not prevent the record of an instrument from constituting constructive notice, continued, "[a]ttention is called, in this connection, to the Act of 1925, 34 STAT. 1 (*sic*) which manifestly alters the rule announced in these decisions; it has no application, however, to this case."

233. See the cases collected in Annot., 63 A. L. R. 1057, 1064 (1929). Illustrative cases in which erroneous entries in the index were held to preclude the record from constituting constructive notice include *Howe v. Thayer*, 49 Iowa 154 (1878) (mortgage by Furman, indexed as Freeman); *Parry v. Reinertson*, 208 Iowa 739, 224 N. W. 489, 63 A. L. R. 1051 (1929) (mortgagor indexed as mortgagee); *Dorman v. Goodman*, 213 N. C. 406, 196 S. E. 352 (1938), commented on in 52 HARV. L. REV. 170 (1938) (deed by J. Frank Crowell indexed as J. L. Crowell); *Prouty v. Marshall*, 225 Pa. 570, 74 Atl. 550, 25 L. R. A. (N. S.) 1211 (1909) (mortgage by L. J. Marshall, indexed as S. J. Marshall).

234. *Bamberg v. Harrison*, 89 S. C. 454, 71 S. E. 1086, Ann. Cas. 1913B 68 (1911) (chattel mortgage filed for record before, but not recorded until after a subsequent purchase). See *Sternberger v. McSween*, 14 S. C. 35, 43 (1880).

the recording officer in recording an instrument incorrectly copies it in the record, such record will be constructive notice to a subsequent purchaser only of the instrument as erroneously recorded,²³⁵ unless the error is apparent from the record, in which event the subsequent purchaser is put on inquiry.²³⁶

13. Recordation in a county other than that in which the land is situated

The South Carolina recording act²³⁷ provides that an instrument affecting title to land required by law to be recorded

235. *Burriss v. Owen*, 76 S. C. 481, 57 S. E. 542 (1907) (chattel mortgage as recorded showing a lesser amount due); *O'Neill v. Cooper River Corporation*, 109 S. C. 35, 95 S. E. 124 (1918) (timber deed as recorded showing a shorter period for removing timber); *Atlantic Coast Lumber Corp. v. Langston Lumber Co.*, 128 S. C. 7, 122 S. E. 395 (1924) (record erroneously omitting words of inheritance from a deed held to give constructive notice only of a life estate). See *McPherson v. McPherson*, 21 S. C. 261, 268 (1884) (record erroneously omitting the seal from a deed said to give notice only of the deed as recorded); *Santee R. C. Lumber Co. v. Elliott*, 153 S. C. 179, 150 S. E. 683 (1929). Cf. *Interstate B. and L. Assn. v. McCartha*, 43 S. C. 72, 20 S. E. 807 (1895) (record of a mortgage omitting a clause in the bond secured thereby); *Equitable Building & Loan Assn. v. Corley*, 72 S. C. 404, 52 S. E. 48, 110 Am. St. Rep. 615 (1905) (record of a mortgage omitting a clause in the bond secured thereby). See generally Annot., 70 A. L. R. 595 (1931).

In *Kennedy v. Boykin*, 35 S. C. 61, 14 S. E. 809 (1892), a record erroneously showing a mortgage to embrace "200 acres, more or less" instead of "2000 acres more or less", was held to be notice of the correct acreage to a subsequent mortgagee, apparently on the theory that the error was immaterial since the acreage was described as "more or less", and the boundaries were correctly given by the record. See discussion of this case in *Interstate Building & Loan Association v. McCartha*, *supra*, in 43 S. C. at p. 77.

236. 4 AMERICAN LAW OF PROPERTY § 17.31, note 36; 41 C. J. 568, note 34; 66 *id.* 1158, note 96.

237. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-101. Section 19-264.1, CODE OF LAWS OF SOUTH CAROLINA, 1952, enacted in 1955 (49 STAT. 191), provides: When any last will or testament is filed with the probate court having jurisdiction a certified copy of same shall likewise be filed with the judge of probate of every county of the State where the deceased owned real estate. The legal representative of the estate shall not be discharged until showing is made to the satisfaction of the court that the provisions of this section have been complied with.

Davis v. Sellers, 229 S. C. 81, 91 S. E. 2d 885 (1956), was a case in which the operative facts occurred prior to enactment of the above statute. It was therein held that a will filed in the county where the testatrix resided was notice to a purchaser of lands of the testatrix situate in another county, the court ruling that "[t]he general recording statutes" (the court so designated Title 60 §§ 101 through 109, and Title 60 § 57) are inapplicable to wills. Regarding § 19-264.1, quoted above, the court stated "we intimate nothing here relative to its effect and interpretation". For a discussion of the *Davis* case see Karesh, *Annual Survey of the South Carolina Law of Wills and Trusts*, 1956, 9 S. C. L. Q. 160, 162 (1956). Professor Karesh is of the opinion that "[i]t is doubtful, to say the least, whether this [§ 19-264.1, *supra*] is a recording statute or whether it does more than impede the granting of a discharge for failure to file". Karesh, *op. cit. supra* 160, 163, note 7.

must be recorded in the county in which the land is situated. Accordingly, it has been held²³⁸ that recordation in a county other than that in which the land is situated does not constitute record notice. However, an exception to the general requirement of recordation in the county where the land lies exists in favor of the State Highway Department. By statute²³⁹ the record of conveyances of rights of way for state highways and of condemnation proceedings for the acquisition thereof, kept by the State Highway Department in its offices at Columbia, is sufficient to impart notice just as though such transactions were recorded in the county where the land is situate. Other statutes²⁴⁰ provide that for the convenience of persons making inquiry, records disclosing certain information as to state highways in the county shall be maintained in the office of the clerk of court (or register of mesne conveyances) for such county. The failure to keep such record in the county, or an error in the record as kept, would seem in no way to impair the notice afforded by recordation in the State Highway Department's offices in Columbia.

D. *Unauthorized records as actual notice*

Whether a record which affords no constructive notice because for some reason²⁴¹ it is not entitled to record will constitute actual notice to a purchaser who sees or otherwise learns of it is a question on which the authorities are not in accord.²⁴² The writer has found no South Carolina case

238. *Cole v. Ward*, 79 S. C. 573, 61 S. E. 108 (1908); s. c. 85 S. C. 259, 67 S. E. 295 (1910). Cf. *London v. Youmans*, 31 S. C. 147, 9 S. E. 775, 17 Am. St. Rep. 17 (1889), holding the record of a chattel mortgage recorded in a county other than that in which the mortgagor resided not to operate as constructive notice to a subsequent purchaser of the chattel.

239. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 33-144, 33-145 [47 STAT. 457 (1951)]. An earlier enactment of a similar statute is in 36 STAT. 1238 (1930).

240. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 33-146, 33-146.1.

241. For the reasons which will prevent a record from constituting constructive notice, see page 391, *supra*, and pages 407-411, *infra*.

242. Cases holding that knowledge of an unauthorized record does not give actual notice are *Kerns v. Swope*, 2 Watts 75 (Pa. 1833); *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460 (1849); *Nordman v. Rau*, 86 Kan. 19, 119 Pac. 351 (1911).

Among cases holding knowledge of an unauthorized record to give actual notice are *Hastings v. Cutler*, 24 N. H. 481 (1852); *Woods v. Garnett*, 72 Miss. 78, 16 So. 390 (1894); *Morrill v. Morrill*, 53 Vt. 74, 38 Am. Rep. 659 (1880); *Parkside Realty Company v. MacDonald*, 166 Cal. 426, 137 Pac. 21 (1913).

A detailed analysis of the case and text authorities is found in Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. PA. L.

squarely deciding the point.²⁴³

E. Purchasers with notice from purchasers without notice

As a general rule a transferee acquiring title with notice of an adverse claim from a transferor who purchased for value without notice of the claim is entitled to the same protection that his transferor is afforded as a bona fide purchaser for value without notice.²⁴⁴ This is true even though

REV. 125, 259 *et seq.* (1945). Professor Philbrick concludes that an invalid record should be held to impart no actual notice. Philbrick, *op. cit. supra* 259, 306. For other discussions of the question, see 4 AMERICAN LAW OF PROPERTY § 17.28, notes 3 through 9; OSBORNE, MORTGAGES 525; Annot., 3 A. L. R. 2d 577, 589 (1949).

243. In *Bossard v. White*, 9 Rich. Eq. 483, 496 (S. C. 1857), the court stated that while the unauthorized record of a deed is not constructive notice, the record "may surely be regarded as a circumstance not of itself sufficient, but combined with others to show notice."

In *McPherson v. McPherson*, 21 S. C. 261 (1884), Mr. Justice McIver concurred in a holding that a purchaser at a sheriff's sale purchased with notice, apparently in part on the theory that the purchaser had actual notice from the unauthorized record of a deed to which expressly he had been referred.

In *Bloom v. Simms*, 27 S. C. 90, 3 S. E. 45 (1887), a mortgage recorded more than sixty days after execution was held, under the Act of 1843, to afford no record notice to a subsequent purchaser for value. By way of dictum the court added (27 S. C. at p. 92): "True, it might possibly have been the means of giving actual notice of its existence to such persons as may have seen the record, if any, but it could not operate as constructive notice to such as had not seen said record, as it would have done had it been recorded within the prescribed time under the Act of 1843."

In *Mowry v. Crocker*, 33 S. C. 436, 441, 12 S. E. 3 (1890), the court, per Mr. Justice McIver, said: "We do not, however, wish to be understood as deciding that the fact that a mortgagee has seen upon the records an informal and defective paper, which at most amounts only to an equitable mortgage, and which was improperly recorded, is sufficient to affect him with actual notice. Upon that question there seems to be a conflict of authority, and as it does not, under the view which we take of this case, properly arise, we do not propose to decide it now."

In *Georgia Ry. v. Koppel*, 246 Fed. 390, 392 (5th Cir. 1917), the court, in affirming the District Court's ruling that an assignment of a bond for title was improperly recorded under South Carolina law because not probated, added, "The circumstance that it was actually transcribed in the records of the county in no way affects the legal proposition involved. If the parties at interest had actually seen the record of the instrument, they would have been put upon notice of its existence; but the constructive notice resulting from the record of an instrument follows only when it is entitled to record."

244. *Fretwell v. Neal*, 11 Rich. Eq. 559 (S. C. 1859); *Southern Ry. v. Carroll*, 86 S. C. 56, 67 S. E. 4 (1910); *Foster v. Bailey*, 82 S. C. 378, 64 S. E. 423 (1909); *Goodwin v. Harrison*, 231 S. C. 243, 98 S. E. 2d 255 (1957). Cf. *McCandless, Recvr. v. Klauber*, 158 S. C. 32, 155 S. E. 141 (1930), holding an assignee with notice from a judgment creditor who obtained judgment without notice of an unrecorded mortgage to have priority over the mortgage. See *Williams v. Jones*, 74 S. C. 258, 262, 54 S. E. 558 (1906) (opinion of circuit judge); *Jones v. Hudson*, 23

the transferee is a donee rather than a purchaser for value.²⁴⁵ However, if the transferee has previously held the property subject to the adverse claim his reacquisition of the property is likewise subject thereto,²⁴⁶ since to hold otherwise would permit a purchaser with notice to defraud an adverse claimant by the device of transferring to a bona fide purchaser and then taking a reconveyance from the latter.

F. *Purchasers without notice from purchasers with notice*

A purchaser of land without notice of a prior conflicting claim will be protected therefrom despite the fact that his grantor had notice of the claim.²⁴⁷

VI

SUFFICIENCY OF COMPLIANCE WITH RECORDING PREREQUISITES

It has already been pointed out²⁴⁸ that the record of an instrument not entitled to record because of failure to comply with the prerequisites of the recording statutes will not afford constructive notice. As a consequence, in passing upon the sufficiency of the record of a title it frequently is necessary for the title examiner to determine whether the fact that the record of an instrument in the chain of title shows some irregularity in the instrument's execution safely may be disregarded as immaterial, or whether such irregularity is a material one vitiating the effect of the record as constructive notice. Fortunately, in most situations the determination is not too difficult a one to make, in view of the considerable body of precedent available.

Certain irregularities unquestionably must be regarded as material ones disqualifying an instrument for record. Thus

S. C. 494, 501 (1885); *Brown v. Wood*, 6 Rich. Eq. 155, 177 (S. C. 1853); *Williams v. Hollingsworth*, 1 Strob. Eq. 103, 113, 47 Am. Dec. 527 (S. C. 1846). 4 AMERICAN LAW OF PROPERTY § 17.11 p. 567; 5 TIFFANY, REAL PROPERTY § 1307 (3rd ed. 1939); Annot., 63 A. L. R. 1362, 1372 (1929).

245. 2 SCOTT, TRUSTS § 316.

246. See *Goodwin v. Harrison*, 231 S. C. 243, 98 S. E. 2d 255, 258 (1957). 4 AMERICAN LAW OF PROPERTY § 17.11 p. 568; 5 TIFFANY, REAL PROPERTY § 1307 (3rd ed. 1939); Annot., 63 A. L. R. 1362, 1372 (1929).

247. *Jones v. Hudson*, 23 S. C. 494 (1885); *London v. Youmans*, 31 S. C. 147, 9 S. E. 775, 17 Am. St. Rep. 17 (1889). 4 AMERICAN LAW OF PROPERTY § 17.11 p. 567; 5 TIFFANY, REAL PROPERTY § 1308 (3rd ed. 1939).

248. See page 391, *supra*.

the record of a deed or mortgage having only one witness,²⁴⁹ not under seal,²⁵⁰ or not bearing the affidavit of a subscribing witness to its execution²⁵¹ (except when by statute an ac-

249. *Harper v. Barsh*, 10 Rich. Eq. 149 (S. C. 1858) (mortgage of real estate). Two witnesses are essential to the validity of a deed. *Craig v. Pinson*, 1 Cheves 272 (S. C. 1840).

250. *Arthur v. Screven*, 39 S. C. 77, 17 S. E. 640 (1893) (mortgage of real estate). *Cf. McPherson v. McPherson*, 21 S. C. 261 (1884) (record erroneously omitting seal from a deed).

251. *Wood v. Reaves*, 23 S. C. 382 (1885) (mortgage of real estate). CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-51 provides:

§ 60-51. *Affidavit prerequisite for recording.*

Before any deed or other instrument in writing can be recorded in this State the execution thereof shall be first proved by the affidavit of a subscribing witness to such instrument, taken before some officer within this State competent to administer an oath. If the affidavit be taken without the limits of this State it may be taken before (a) a commissioner appointed by dedimus issued by the clerk of the court of common pleas of the county in which the instrument is to be recorded, (b) a commissioner of deeds of this State, (c) a clerk of a court of record who shall make certificate thereof under his official seal, (d) a justice of the peace who must append to the certificate his official seal, (e) a notary public who shall affix thereto his official seal within the State of his appointment, which shall be a sufficient authentication of his signature, residence and official character, (f) before a minister, ambassador, consul general, consul or vice consul or consular agent of the United States of America or (g) in the case of any officer or enlisted man of the United States Army, Air Force, Navy, Marine Corps or Coast Guard on active duty outside the continental confines of the United States, any commissioned officer of said Army, Air Force, Navy, Marine Corps or Coast Guard, if such probating officer shall state his rank, branch and organization.

CODE OF LAWS OF SOUTH CAROLINA, 1952 § 44-475 provides:

§ 44-475. *Officers may take affidavits, probates of deeds, etc.*

For the duration of World War II and for six months thereafter all verifications of pleadings, probates of deeds and mortgages, proofs of claims, affidavits and renunciations of dower made or taken before a commissioned officer of the armed forces of the United States who shall state in writing after his name his rank and service serial number or before any officer of the United States Merchant Marine, whether within or without the limits of the United States shall have the same force and effect as if made or taken before an officer designated in the appropriate section of this Code as authorized to take the same and in such cases no official seal shall be necessary. This section shall be retroactive to December 7, 1941.

CODE OF LAWS OF SOUTH CAROLINA, 1952 § 44-476, enacted in 1955 (49 STAT. 88) provides:

§ 44-476. *Officers may act as notaries public.*

Any commissioned officer of the Armed Forces of the United States or any officer of the United States Merchant Marine, serving either within or without the limits of the United States, may verify pleadings, probate deeds and mortgages, take renunciations of dower, proofs of claims and otherwise act in the same capacity as a notary public. When acting as such the officer shall sign his name, rank, serial number and organization and in such cases no official seal shall be necessary. This section shall be retroactive to December 7, 1941.

knowledge²⁵² or other affidavit²⁵³ may be substituted therefor) does not constitute constructive notice of the existence of such deed or mortgage.

A frequent source of concern is the effect of irregularities in the affidavit of a subscribing witness to the execution of an instrument,²⁵⁴ which in South Carolina is commonly referred to as the "probate".²⁵⁵ While the customary procedure is to have the witness making the affidavit sign his name thereto, it has been held that such signature by the affiant is not essential to the validity of the probate.²⁵⁶ Further, the failure of the notary public to complete the probate form by inserting therein the name of the witness who with the affiant witnessed the transaction has been held to be a mere clerical omission which may be disregarded.²⁵⁷ However, where an acknowledgment was not signed by the party making the same, the failure of the notary public to insert the name of the

252. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-54 provides:

§ 60-54. *Special provision for duration of war.*

For the duration of the present war and six months thereafter, it shall be lawful for the clerks of court, registers of mesne conveyances and all other public officers of this State whose duty it is, under the law, to file and record written instruments in the nature of verifications of pleadings, proofs of claims, powers of attorney, conveyances of real estate, mortgages of real estate, mortgages of personal property and renunciations of dower, to do so when the execution of such instrument has been proved by the affidavit of a subscribing witness thereto or by an acknowledgment of same before some officer or person authorized by the law of this State to administer oaths, regardless of the State or county in which such instrument may have been executed. When such an instrument in writing, whether the execution of it has been proved by probate or acknowledgment, has been recorded, such recording shall constitute notice in the same manner and for the same purpose as provided by law in this State for recording instruments.

253. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-55 provides:

§ 60-55. *When affidavit of subscribing witness cannot be procured.*

When the affidavit of a subscribing witness cannot be had by reason of the death, insanity or absence from the State of such witness, any such instrument may be recorded upon proof of such fact and of the handwriting of the parties who signed the instrument and of the subscribing witnesses by proper affidavit, the proof in every case to be recorded with the instrument.

254. See generally, Annots., 19 A. L. R. 1074 (1922); 72 A. L. R. 1039 (1931); 29 A. L. R. 919 (1924); 25 A. L. R. 2d 1129 (1952).

255. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-54 quoted in note 252, *supra*.

256. *Armstrong v. Austin*, 45 S. C. 69, 22 S. E. 763 (1895). The same construction was placed upon the earlier Act of 1788 (7 STAT. 347). *Fuller v. Misroon*, 35 S. C. 314, 14 S. E. 714 (1892).

257. *Arthur v. Hollowell*, 111 S. C. 444, 98 S. E. 202 (1919).

acknowledgor was held to be fatal to the validity of the acknowledgment.²⁵⁸

If the probate or acknowledgment of an instrument is made within the state before an officer competent to administer an oath, it seems that the omission of his official title is immaterial.²⁵⁹ In the case of a domestic notary public, since the Act of 1871²⁶⁰ the omission by him of his seal has been immaterial if his official title is affixed to his signature. However, if the probate or acknowledgment is made without the state before a foreign notary public, the statute prescribes that such notary public shall affix his official seal.²⁶¹

When it appears on the face of an instrument that the officer taking the probate or acknowledgment thereof is disqualified because of interest or for other cause, the record of the instrument does not operate as constructive notice.²⁶² However, where such disqualification of the officer was not ap-

258. *Seale Motor Co. v. Stone*, 218 S. C. 373, 62 S. E. 2d 824, 25 A. L. R. 2d 1118 (1950) (construing an acknowledgment which had been executed in Kentucky, purportedly in compliance with the Kentucky statute. The court stated that as executed the acknowledgment was defective under both South Carolina and Kentucky law.).

259. *Carolina Savings Bank v. McMahon*, 37 S. C. 309, 16 S. E. 31 (1892); *McCreary v. Coggeshall*, 74 S. C. 42, 53 S. E. 978, 7 L. R. A. (N. S.) 433 (1906). Cf. *Genobles v. West*, 23 S. C. 154 (1885).

260. 14 STAT. 538 (1871), reenacted 27 STAT. 139 (1911). The text as presently in CODE OF LAWS OF SOUTH CAROLINA, 1952 § 49-6 reads:

§ 49-6. *Seal of office.*

Each notary public shall have a seal of office, which shall be affixed to his instruments of publication and to his protestations. But the absence of such seal shall not render his acts invalid if his official title be affixed thereto.

In *Carroll v. Cash Mills*, 125 S. C. 332, 118 S. E. 290 (1923), the omission of a seal from the probate of a title retention contract was held immaterial in view of the Act of 1871.

261. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-51 set out in note 251, *supra*.

262. *Woolfolk v. Graniteville Mfg. Co.*, 22 S. C. 332 (1885) (deed executed in South Carolina but probated before a magistrate in Georgia); *Watts v. Whetstone*, 79 S. C. 357, 60 S. E. 703 (1908) (probate taken before grantor as notary public).

Prior to the Act of 1938 (40 STAT. 1559) a stockholder of a corporation was disqualified to act as a notary public in taking an acknowledgment of any conveyance to or from the corporation. See *Tuten v. Alameda Farms*, 134 S. C. 195, 192 S. E. 153 (1937), holding a renunciation of dower taken before a notary public who was a stockholder in the grantee corporation to be invalid. The text of the Act of 1938, as presently embodied in CODE OF LAWS OF SOUTH CAROLINA, 1952 § 49-11 is as follows:

§ 49-11. *Not disqualified when stockholder, director, officer or employee of corporation.*

A notary public who is a stockholder, director, officer or employee of a corporation may take renunciation of dower in any written instrument, take the acknowledgment or the oath of a subscribing witness of any party to a written instrument executed to or by such corporation, administer an oath to any

parent on the face of an instrument, the record thereof was held to afford constructive notice to a subsequent purchaser.²⁶³

It is provided by statute²⁶⁴ that "[b]efore any deed of conveyance of real property . . . can be placed on record . . . it must have thereon the indorsement of the county auditor that it has been entered of record in his office." Although by virtue of the statute it is the register's duty not to record a deed until it bears the auditor's indorsement, if recorded without compliance with the statute it seems that such record nevertheless affords constructive notice.²⁶⁵

stockholder, director, officer, employee or agent of such corporation or protest for non-acceptance or non-payment bills of exchange, drafts, checks, notes and other negotiable instruments which may be owned or held for collection by such corporation. But when a notary public is individually a party to an instrument it shall be unlawful for him to take the acknowledgment or probate to such instrument executed by or to a corporation of which he is a stockholder, director, officer or employee or to protest any such negotiable instrument owned or held for collection by such corporation.

Section 2 of the act, which validated probates and other notarial functions performed prior to its passage, is omitted from CODE OF LAWS OF SOUTH CAROLINA, 1952.

263. *Franklin Savings & Loan Co. v. Riddle*, 216 S. C. 367, 57 S. E. 2d 910 (1950) (probate of a chattel mortgage made before a partner of the mortgagee partnership as notary public). *Cf. Dillon & Son Co. v. Oliver*, 106 S. C. 410, 91 S. E. 604 (1917) (subscribing witness who made the affidavit a member of the mortgage firm).

264. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 60-56. See also § 60-59.

265. See *Pan American Life Ins. Co. v. Mayfield*, 49 F. 2d 900 (E. D. S. C. 1929), *aff'd* 49 F. 2d 906 (4th Cir. 1931). *Cf. McNamee v. Huckabee*, 20 S. C. 190 (1883).